

Death Penalty: A Cruel and Inhuman Punishment

L. Arroyo Zapatero, W. Schabas y K. Takayama (edit.)
M. Muñoz de Morales (Coord.)



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EDITORS' FOREWORD

For a Humanist Criminal Policy: Against the Death Penalty

Throughout 2013, intense activity has taken place at the International Academic Network against the Death Penalty, established at the initiative of the International Society for Social Defence (ISSD) and with the support of the Asociación Internacional de Droit Penal (AIDP), to accompany the action of the International Commission against the Death Penalty (www.icomdp.org), chaired by Federico Mayor Zaragoza and including such leading figures as Robert Badinter and Ruth Dreyfus. In the first place, the V World Congress was held in Madrid in the month of June, organized by the *World Coalition against the Death Penalty*, in support of which the Academic Network organized a symposium at the Real Academia de Bellas Artes de San Fernando, at which among others the problems of deterrence and the consideration of the death penalty as a cruel and inhuman punishment were studied. Hans-Jörg Albrecht, Gabrio Forti, Roger Hood, William Schabas, Sandra Babcock, Adán Nieto, Eduardo Demetrio, Rosario Vicente, Francesco Viganò, Jon Yorke, Mercedes Alonso, Salomao Shecaira, María Acale, Marcelo Aebi, Sergio García Ramírez, Luis Luís Niño, Anabela Miranda, José Luis de la Cuesta, Stefano Manacorda, Luigi Foffani and Jacobo Dopico all participated as speakers, among others. Also present at the event were the Secretary of State, Gonzalo Benito, the Deacon of the College of Lawyers of Madrid, Sonia Gumpert, and the former President of the Government of Spain, José Luis Rodríguez Zapatero.

In forthcoming weeks, a book will be published with a large number of the texts. In particular, Luigi Foffani represented the Network at an important event jointly organized by the Universidad de Padua and the International Commission, and a

further one-day conference was held at the Helsinki-Spain Foundation at Madrid with the participation of Marta Muñoz de Morales.

As regards the international day against the death penalty, on 10th October, one-day conferences were organized by INACIPE in Mexico, with Rafael Estrada and Sergio García Ramírez, in Bogota, at the Universidad Externado of Colombia, with Jaime Bernal Cuellar and Paula Ramírez, and at San Juan de Puerto Rico, with events at the Universidad InterAmericana and the Universidad del Sagrado Corazón, as well as at the School of Fine Arts with the extraordinary exhibition of Antonio Martorell, an artist at the Universidad de Puerto Rico, where ten engravings were displayed on the «trappings of the death penalty» the name of which was taken from a phrase of the Spanish pop song «Pena, penita pena». In testimony to the above, we reproduce the contributions from the publication edited by Juan Bordes and Luis Arroyo «Francisco de Goya, entre las penas crueles e inhumanas [Francisco de Goya, among cruel and inhuman punishments]», with the introduction by Luis Arroyo and the preface to the Mexican edition by Sergio García Ramírez.

In October a seminar was also held in Paris at the École Normale Supérieure. The seminar was organized by Professors J. L. Halperin, Marc Crépon (both from the École Normale Supérieure) and Professor Stefano Manacorda from the Collège de France. It counted with the participation, among others, of Mireille Delmas-Marty, Robert Badinter, William Schabas and Luis Arroyo Zapatero. The proceedings will be also published soon.

The editors of this book, whose content has been carefully coordinated by Marta Muñoz de Morales, certainly share the desire that it contribute to the debate on the abolition and universal moratorium of the death penalty as it is foreseen by the UN Resolution adopted in July 2007.

December 2013

Luis Arroyo Zapatero, William Schabas, Kanako Takayama

THE ABOLITION OF THE DEATH PENALTY: A QUESTION OF RESPECT FOR HUMAN RIGHTS

FEDERICO MAYOR ZARAGOZA

President of the International Commission
against the Death Penalty

The *Real Academia de Bellas Artes de San Fernando* is a very appropriate spiritual and physical setting in which to describe, in writing and in words, the work to which I have most recently dedicated myself: the universal abolition of the death penalty and the advancement of human rights in the world. The Academy is a good place because, as well as my slight sense of ownership as an honorary member; this is a house of learning and our awareness of being human moves us to ascertain the nature of the human condition. This leads both the individual and the State to demand the banishment of cruel practices, contrary to human dignity, in our everyday life. Among these horrendous and irreversible practices figures the death penalty.

The Academy is a very special house of learning, because it is the house in which works of art are studied, the most exquisite objects that human beings produce. But, more importantly, the works of the great master of painting and drawing, don Francisco de Goya, are conserved and studied here, in this Academy and in the *Museo Nacional de Calcografía*. Better than anyone else, Goya knew how to reflect the problems of his times in his drawings and etchings, which to a great

Mayor, F. (2014), The Abolition of the Death Penalty: A Question of Respect for Human Rights. In Arroyo, L., Schabas, W., Takayama, K. & Muñoz, M. (cords.) *Death Penalty: A Cruel and Inhuman Punishment* (pp. 11-18). Cuenca: Ediciones de la Universidad de Castilla-La Mancha.

extent still form part of ours: violence, cruelty, hunger, abuse and intolerance. And Goya not only described the problems. The most important thing is that he also conveys the critical emotion of what he describes with his pen strokes and charcoals. His drawings and etchings not only represent the disasters of war and of life, but they raise the spirits of the onlookers against those disasters; they are, I say, drawings against violence, against the cruelty of punishments, against the death penalty. More than a good dozen of these drawings represent and denounce the practice and the cruelty of the death sentence; we hardly need even to look at the *Fusilamientos del 3 Mayo* [Shootings of May the 3rd], although its national character in no way clouds its universal dimension. And it happens that since 2010, I have been a member of and have chaired the work of the International Commission against the death penalty.

INTRODUCTION

The International Commission against the Death Penalty (ICDP) was launched in Madrid in October, 2010. ICDP is an independent body, composed of 15 personalities of international prestige with abundant experience in human rights.¹ ICDP includes former presidents, prime ministers, government ministers, senior UN officials, a former US State governor, a former judge and president of the International Court of Justice, a senior judge and a leading academic. The Commissioners represent all world regions – demonstrating that abolition of the death penalty is a global concern and not the cause of a particular region. They do not represent their country and act with independence in their decision-making.

The ICDP opposes capital punishment in all situations and urges the immediate establishment of a universal moratorium on executions as a step towards total abolition of the death penalty. Each Commissioner has expertise in human rights and is committed to the global abolition of capital punishment. The Commissioners' experience and knowledge enables them to address politically sensitive issues and to engage with senior officials from countries where the death penalty is still used. Their knowledge, influence and broad geographical representation endow ICDP with a high profile in the international arena. The Commission usually meets twice a year to review reports and to agree on future strategies and activities.

1 Federico Mayor (Spain) President of ICDP, Giuliano Amato (Italy), Louise Arbour (Canada), Robert Badinter (France), Mohammed Bedjaoui (Algeria), Ruth Dreifuss (Switzerland), Michèle Duvivier Pierre-Louis (Haiti), Hanne Sophie Greve (Norway), Asma Jilani Jahangir (Pakistan), Ioanna Kuçuradi (Turkey), Gloria Macapagal-Arroyo (Philippines), Rodolfo Mattarollo (Argentina), Ibrahim Najjar (Lebanon), Bill Richardson (USA), and Honorary member Jose Luis Rodriguez Zapatero (Spain).

The personal involvement of ICDP members with the abolition of the death penalty means that the Commission is well placed to engage with senior officials from countries that have yet to abolish capital punishment. For example, Robert Badinter was Minister of Justice in France and was a key figure in France's decision to abolish the death penalty in 1981. Gloria Macapagal-Arroyo was President of the Philippines and, in June 2006, she signed «Republic Act 9346» into law, which prohibits the imposition of the death penalty in the Philippines. Bill Richardson, Governor of New Mexico (2003–2011), signed an abolition bill into law on 18 March 2009. Former Justice Minister Ibrahim Najjar submitted a draft law to repeal the death penalty in Lebanon. Following his refusal to sign execution warrants, there has, since July 2008, been a *de facto* moratorium on executions in Lebanon.

A diverse group of 16 countries from all regions supports and funds the work of ICDP.² This Support Group carries out its activities under the coordination of a rotating yearly presidency. Norway currently holds the Presidency until Argentina assumed the role in October 2013. The past presidencies were: Spain, October 2010 to October 2011, and Switzerland, October 2011 to October 2012. The Geneva-based secretariat has responsibility for organizing the work of the Commission and together with the Support Group for advising and assisting the Commission in its work.

INTERNATIONAL TREND TOWARDS ABOLITION

ICDP seeks to reinforce the global trend against the death penalty and is part of an international movement working in that direction. This move towards abolition is witnessed in all regions in the world regardless of political system, religion, culture or tradition. These diverse Nations have accepted that State killing is wrong and fails to deter crime. They acknowledge that modern justice systems must protect the public from crime, but without the inherent risks of executing the innocent and inflicting cruel forms of executions.

The move towards abolition of the death penalty is no longer a concern of a minority of states. More than 60 years after the adoption of the Universal Declaration of Human Rights, the trend towards abolition is clear. Today, some 150 countries have abolished the death penalty in law or practice. The fact that more than two-thirds of all states have shunned the death penalty has led the UN General Assembly to adopt resolutions calling on states which retain capital punishment to establish a moratorium on executions with a view to its definitive abolition.

2 Algeria, Argentina, Dominican Republic, France, Italy, Kazakhstan, Mexico, Mongolia, Norway, Philippines, Portugal, South Africa, Spain, Switzerland, Togo and Turkey.

According to Amnesty International's report on «Death Sentences and Executions 2012», despite some setbacks, the global trend towards abolition of the death penalty has not slowed down. The number of countries that performed executions in 2012 was 21, the same as in 2011, but fewer than the 28 countries which carried out executions a decade earlier, in 2003. Most executions are carried out in only five states: China, Iran, Iraq, Saudi Arabia and the USA. China is believed to execute more people than the rest of the world put together, but due to lack of transparency over its use of the death penalty, it is not possible to obtain exact figures.

Although the USA remains in the top five executing countries, there has been a steady decline in its use of the death penalty. According to a December 2012 report issued by the Washington-based Death Penalty Information Centre, 77 people were sentenced to death in 2012, the second lowest total since capital punishment was reinstated in 1976. The total number of executions in 2012 was 43, the same as in 2011. Seventy-five per cent of executions took place in the US states of Arizona, Mississippi, Oklahoma and Texas. The US states of Connecticut, Illinois, Maryland, New Jersey, New Mexico and New York have all abolished the death penalty over the last 10 years. Other states such as Colorado and New Hampshire appear to be moving closer to abolition and the state of Oregon introduced a moratorium on executions in 2011.

Africa is largely free of executions, with only five countries (Botswana, The Gambia, Somalia, South Sudan and Sudan) reported to have carried out executions in 2012. In the Americas, only the USA executes people on a regular basis. The Caribbean is an execution-free zone and the number of death sentences imposed has declined since the abolition of the death penalty in large parts of the region. In Asia, a few countries have abolished capital punishment, but others continue to apply it. All European countries, except for Belarus, have abolished the death penalty. This abolitionist trend has been reinforced by the adoption of European treaties. Neither the 2004 Madrid bombing, nor the 2005 London attacks, nor Anders Breivik's 2011 mass killings in Oslo and on the island of Utøya, in Norway, have led to the reintroduction of capital punishment. In the Middle East, the Arab Spring awakened hopes for greater respect for human rights, but while a number of states have not carried out executions there is little progress towards abolition of the death penalty in law.

The 'right to life' is the most important of all human rights and is recognized in human rights treaties, court judgements and resolutions of international bodies such as the United Nations. Abolition of the death penalty reinforces the 'right to life'. There are three core reasons which support the 'right to life' and the repeal of capital punishment: the risk of executing the innocent, the failure of the death penalty to act as a deterrent, and arbitrariness in the use of this punishment.

INNOCENCE

All criminal justice systems are designed and run by people. People are human beings and make mistakes, so no justice system will ever be perfect. There will always be the possibility of a miscarriage of justice, which means that a person may be killed for a crime in states that retain the death penalty.

Some might argue that there is little likelihood of the innocent being executed. However, even in highly developed legal systems, there is a body of evidence that people are convicted of crimes they did not commit, and that innocent people have been executed when these were capital crimes.

The democracies of Europe no longer use the death penalty as a judicial punishment. They have acknowledged that mistakes were made when capital punishment was used; that the state executed innocent people. It was this recognition that contributed to the abolishment of capital punishment in Europe.

The USA has a highly developed legal system. A justice system with numerous safeguards for those who face the death penalty and yet, since the early 1970s, more than 140 death row inmates have been exonerated (the Death Penalty Information Centre). These were not people whose sentences or convictions were overturned on a legal technicality – these people were sent to death row for a crime they did not commit.

If a person is sent to prison and it is revealed to be a miscarriage of justice, that person will be released and compensated for the time spent in prison, but if an innocent person has been executed there is no redress for the victim. The punishment is final. All the state can do is to acknowledge that it has made a grave mistake. Such miscarriages of justice risk undermining public confidence and respect for the judicial system.

DETERRENCE

A common perception among the general public is that the death penalty deters people from committing serious crimes, that somehow, carrying out executions will mean fewer murders. However, various studies have shown that the death penalty makes little difference to murder rates. In the USA, a number of studies have demonstrated that the death penalty is no more effective as a deterrent than, for example, life imprisonment.

Some of those sentenced to death have either mental health problems or were under the influence of alcohol or drugs when they committed the offense. These individuals have not acted rationally. They will not have thought through the consequences of their actions or the likelihood that they may be executed. Others are professional criminals who made a calculated decision in the belief that detection

and conviction were unlikely. Those who commit terrorist acts for political ends are committed to a cause and are often prepared to die for that cause. As such they are unlikely to be deterred by the death penalty and the execution of such criminals may merely elevate their status to that of a martyr.

UNFAIRNESS

The death penalty is inherently arbitrary. It is often imposed on the most marginalised members of society. Individuals from the poorer sectors of society are at far greater risk of being sentenced to death than a wealthy individual who committed a similar crime, and because they are poor they will often not even have good legal representation at their trial.

Ethnicity and race also play a significant role in whether the death penalty is or is not imposed. In the USA, for example, studies demonstrate that a black person is more likely to be executed for the crime of murder than a white person. A disproportionate number of death row inmates in prisons across the US are African-Americans, in comparison with their percentage of the total population.

The death penalty is imposed on the mentally ill, even in systems with procedural and material guarantees. Some suffered from a mental illness at the time they committed their offenses. Others became mentally ill during the trial process or after their sentencing and imprisonment.

In short, socio-economic status, mental disorder and race are decisive factors when determining who will be forced to suffer the death penalty.

CONCLUSION

Any campaign that seeks positive change, such as abolition of the death penalty, will encounter setbacks and resistance, but these have to be envisaged from the outset and studied in a broader context. Alongside some negative situations, there are also a number of positive developments. Mongolia, for example, ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at abolition of the death penalty and it is taking steps to abolish the death penalty in national law. Steps have been taken towards abolition in the USA, where the states of Connecticut and Maryland have recently repealed the death penalty. In China, the application of safeguards and restrictions on the use of the death penalty has reportedly reduced the number of executions, although the death penalty is still widely used. The high number of executions, for example, in Iran, Iraq and Saudi Arabia is alarming, not only because of the application of the death penalty in itself, but also because these countries fail to comply with the most minimum international human rights standards on the death penalty and its application.

States can adopt various measures to further the cause of abolition. The first would be to reduce the number of death sentences. It is imperative that retentionist countries comply with international standards when imposing the death penalty. For example, were the death penalty only imposed for murder, it would be dramatically reduced in such countries as China, Indonesia, Iran, Malaysia and Saudi Arabia. In Iran, for example, more than 75% of all executions are for drug offences and only about 3% are for murder. The second measure would be for retentionist states to implement the UN's call for a moratorium on executions. This would give time for those states to study the use of the death penalty and the experience of abolitionist states in combating serious crime without recourse to the death penalty. Third, those states which do not use the death penalty and have yet to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at abolition of the death penalty should do so without delay.

Retentionist countries often assert that there is widespread public support for capital punishment, but public opinion is a complex matter. Public opinion polls have a tendency to simplify the role of the death penalty in the criminal justice system. The public often believe that the death penalty acts as a deterrent to serious crime, even though there is little evidence to support this conclusion. Where governments have abolished the death penalty, there is usually no great public outcry, and it usually remains abolished. In many countries, the death penalty has been abolished thanks to strong political leadership. ICDP member, Robert Badinter, showed political leadership when, as Minister of Justice in France, he abolished capital punishment despite public opinion.

This leadership to abolish the death penalty may come from politicians, from religious leaders, and individuals and leaders of civil society organizations. Experience shows that the death penalty can be abolished, even when public opinion appears to favour such punishment. This was the case, for example, in Canada, France, Germany and the United Kingdom. Abolition was possible because the legal and parliamentary elites in those countries had decided that abolition was a human-rights principle, not a crime-control tool. Abolition provoked some controversy, but after a few years the debate subsided, and support for executions declined.

Once seen solely as a matter of criminal justice, the use of the death penalty by the state is now an international concern and part of the mainstream human rights agenda. The global abolitionist movement is gathering strength, as more countries turn their back on the death penalty. Ultimately, abolition is a question of respect for human rights. Like branding, flogging, and torture the death penalty will eventually be accepted for what it is: a cruel, inhuman and degrading punishment. ICDP's work should be seen as a contribution by influential and respected voices of international standing towards the achievement of a world that is free from the scourge of the death penalty.

A FINAL CONSIDERATION FROM MADRID

Spain decided, in its Constitution of 1978, to abolish the death penalty, more than convinced by the fervent desire to banish a measure from our collective way of life that, as a punishment or as a reprisal, had been enforced throughout Spain in epidemic proportions. It was an important part of overcoming the terrible civil war and the harsh post-war years. It should be recalled that the application of the death penalty continued to be applied up until 1975. In 1995, *los Cortes* repealed the exception foreseen in article 15 of the Spanish Constitution: military legislation in times of war. Finally, in December 2009, on the eve of the preparations for the establishment of the International Commission against the death penalty, Spain ratified protocol number 13 of the European Convention on Human Rights, which at a constitutional level deprives the death penalty forever of legal life. From the fifth International Congress against the Death Penalty that will be held in Madrid, it is now a question of giving impetus to abolition at an international level, unifying the will of people, governments, international organisations and human-rights organizations, to achieve a universal moratorium in 2015. This has been called for by the majority of members at the United Nations General Assembly, since 2007, in the framework of the global discussion that will take place this year, throughout the world, on the achievements and failures of the Millennium Objectives, as was proposed by the United Nations Assembly General, in 2000.

They are all good thought provoking causes, since the many drawings and etchings of Francisco de Goya, which call on us to take heed and mobilize us against human cruelty, against famine, against so many curable illnesses in the developed countries, against hatred and discrimination against women, against the failures of the educational process, in so many millions of children and young people in this world. For all of those reasons, for the progress of human rights and, above all, against cruel and inhuman punishment, it is highly advisable to speak out in support of the great metamorphosis of brute force into the word.

INTRODUCTORY REVIEW OF THE CURRENT SITUATION AS REGARDS PROGRESS TOWARDS THE ABOLITION OF THE DEATH PENALTY AND POSSIBLE NEXT STAGES

ROGER HOOD

Professor Emeritus of Criminology, University of Oxford

I have been asked to make a few preliminary remarks about the progress of the abolitionist movement as a background to your discussions – although I would be surprised if I am able to say anything that is new to you.

At present, 106 –that is over half– of 198 independent countries in the world –have abolished the death penalty, 99 of them have rejected it completely in all circumstances– an enormous increase from the 12 countries that had done so by 1966. A new pattern has been set. The majority of countries since the end of the 1980s have moved swiftly from executions to complete abolition: for example, Mongolia has, in effect, just abolished capital punishment by ratifying Protocol No 2 to the ICCPR only four years after the country had ceased executions. Furthermore, the majority (85%) of countries which abolished the death penalty for the first time since 1989 did so completely in ‘one go’, so to speak, unlike earlier

Hood, R. (2014), Introductory Review of the Current Situation as Regards Progress Towards the Abolition of the Death Penalty and Possible Next Stages. In Arroyo, L., Schabas, W., Takayama, K., & Muñoz, M. (eds.). *Death Penalty: A Cruel and Inhuman Punishment* (pp. 19-22). Cuenca: Ediciones de la Universidad de Castilla-La Mancha.

abolitionist countries, such as the Netherlands, Italy and the UK, that first abolished it for ordinary crimes before extending it to crimes against the state and military offences often many years later. Should efforts therefore now concentrate solely on complete abolition as the only acceptable objective? Desirable as it is that the death penalty is swept away completely, there may be a pragmatic case in relation to countries suffering political violence and terrorism for first persuading them to abolish it for all ordinary crimes even if they claim that there are overwhelming political barriers to enabling them to abolish it for terrorist killings at the present time. India may be a case in point. The death penalty for murder is rarely imposed (in 2010 in just 0.5% of convictions) and there have been no executions since 2004, but where there is strong political pressure to retain and use capital punishment for attacks on the state, as in the case of the Mumbai massacre, the sole surviving gunman (Mohammed Kasab) having recently had his death sentence confirmed by the Indian Supreme Court.

Among the 91 countries that retain the death penalty in law (excluding Benin and Mongolia), 47 have not executed anyone within the past 10 years or more recently have announced a moratorium. These are classified by the United Nations and the *deathpenaltyworldwide* website as abolitionist *de facto*. Amnesty International regards 33 of them as truly 'abolitionist in practice.' Should these be routinely added to those who have abolished the death penalty *de jure* as is commonly done when presenting the total number of abolitionist countries? The recent experience of Gambia proves that a moratorium is not enough if people continue to be sentenced to death and not immediately granted clemency and a substitute sentence of imprisonment. Furthermore lengthy periods free of executions do not necessarily signal that the case for universal abolition has been accepted. It should be recalled that only 109 countries cast their vote in favour of the resolution for a world-wide moratorium at the UN in 2010, and that while only 42 (22 per cent) voted against, they including seven regarded as abolitionist in practice. Thirty-five countries abstained. Of 32 listed by Amnesty as abolitionist in practice who took part, only 10 voted in favour of the resolution seven voted against and 15 abstained: altogether, 11 signed the Note Verbale objecting to the attempt to impose a moratorium¹. Surely these countries should be targeted, for it is the weight of the favourable vote and the real total of those who have abandoned capital punishment in their laws that will be decisive in demonstrating to retentionist countries that they are becoming more and more marginalized.

* This is a condensed and updated version of the report submitted before the International Commission against Death penalty (www.icadp.org), Ministry of Foreign Affairs, Madrid, October 2012.

1 Brunei, Central African Republic, Eritrea, Grenada, Laos, Burma, Niger, Papua New Guinea, Sierra Leone, Swaziland, Tonga

Another target should be the four retentionist countries that have signed but not yet ratified the ICCPR (China, Cuba, Comoros and St Lucia), and the eight that have yet even to sign the Treaty. In addition to these 12 active executing states there are four others that retain the death penalty but are abolitionist in practice. Given the importance of the ICCPR and especially the Second Optional Protocol in cementing abolition once achieved, it seems to me very important not to overlook the value of pressing these 16 countries to ratify the ICCPR – in particular to press China and Cuba to move from signature to ratification and for Malaysia, Oman, Qatar, St Kitts, Singapore and Burma to sign and ratify the treaty. I need hardly say that this is because, although article 6(2) of the treaty requires retentionist states to restrict the scope of capital crimes, article 6 (6) does not permit them to invoke the fact that they have done so as a reason for delaying or preventing the abolition of capital punishment. Furthermore article 7 proscribes ‘any cruel, inhuman or degrading treatment or punishment’ in all states party to the Covenant.

There can be no doubt that the emphasis on universal ‘human rights’ has added greatly to the normative, moral, force propelling the abolitionist movement. But so have two other related developments that have greatly weakened the defensive posture of the remaining retentionist nations.

The first has been referred to, namely the speed of increase, like a tidal wave, of the number of abolitionist countries within a mere quarter of a century. This has created a normative pressure on those who have lagged behind, raising concerns in those countries for their national reputation in the human rights field, as is being evidenced, for example, by debates in China and Japan. As one prominent and influential Chinese senior scholar, Professor Zhao Bingzhi of Beijing Normal University put it recently at an international meeting: ‘Abolition is an inevitable international tide and trend as well as a signal showing the broad-mindedness of civilized countries ... [abolition] is now an international obligation’.

Second, the spread of abolition throughout the world to include countries of varying cultures and social and political structures has severely undermined the argument of those who have taken a cultural relativist’s position on this issue. Although largely European led, it has been embraced in South America, in many parts of Africa, among secular Muslim states, and is beginning to make headway in Asia, as seen by declining rates of execution in China, Malaysia, Singapore and Thailand. In the United States too capital punishment is in decline. Five states have recently abolished it and the Governor of Oregon has announced a moratorium. California will hold a plebiscite in November. Only 12 of the 51 US state jurisdictions actually executed anyone in 2011 and only seven of them more than one person. The impression often given, that in America there is enthusiasm everywhere for executions is now wide of the mark. Public support has fallen

from 80 per cent in 1994 to 61 per cent in 2011. Those who campaign for abolition worldwide can hope that it will not be many years before the US Supreme Court will be able to find that the majority of States, in line with a majority of countries worldwide, do not support the death penalty for anyone, and therefore, following its jurisprudential precedents established in *Atkins* and *Roper*, to rule that 'emerging standards of decency' will no longer tolerate the use of this cruel and unusual punishment for any crime in any part of the USA.

Only 44 countries (22%) have executed anyone within the past 10 years and not yet announced a moratorium. Last year only 20 nations carried out a judicial execution and only nine countries regularly execute more than 10 persons a year: China, Iran, Iraq, Saudi Arabia, North Korea, Vietnam, Somalia, Yemen and the USA. The set-back in Gambia this autumn when nine persons were executed on one day after 27 execution-free years came as a shock, but it was heartening when the threat to execute all 37 other prisoners on death row was quickly suspended after strong international condemnation, especially from the African Union.

All this has made the claim that the abolitionist movement is an imperialist invention, that it is an assault on sovereignty and can be justified as a cultural expression or by appeal to public opinion, ever harder to sustain. In particular, the argument that capital punishment is a 'domestic criminal justice issue' not a 'human rights issue', as if it is either one or the other, is based on a false antithesis. Whatever system of criminal justice a country may chose, there must be limits to the power that the state can be permitted to exercise over persons accused of and convicted of crimes, however serious: limits defined by universal human rights principles which apply to all citizens of the world.

Abolition of capital punishment is clearly becoming the litmus test for all countries that purport to respect international human rights norms. The scales have tipped decisively against retentionist states. Those that remain will become more and more isolated and stigmatized. They will come under increasing pressure to protect the human rights of all their citizens, even the worst behaved among them, and to accept as an international human rights norm that the death penalty is an outmoded, cruel and dehumanizing punishment. In my view it should be made clear to all states party to the ICCPR that retain the death penalty in their law (including those that are 'abolitionist in practice') that they are morally bound by the universalistic goal of that Treaty to fulfil their obligation under Article 6(6) to do nothing to delay or prevent the final abolition of capital punishment.

HARD-CORE EXECUTIONERS

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It has only been about two decades since the balance tipped and the number of States in the world that had stopped using the death penalty became the majority. The United Nations Secretary-General's fifth quinquennial report on the status of capital punishment in the world, published at the beginning of 1996, reported 90 'retentionist' States, 58 'completely abolitionist' States, 14 States that were abolitionist for 'ordinary crimes only', and 30 'abolitionist de facto' States¹. In other words, 102 States had stopped using the death penalty compared with 90 that retained it. Fifteen years later, when the eighth report was issued, the retentionist States numbered 47 and the abolitionists States 149². The trend towards abolition is also manifested in other ways, for example the record of voting on the bi-annual resolutions in the United Nations General Assembly.

Some observers have worried about the fragility of developments towards abolition. Concerned about the possibility of volatile shifts in public opinion, they imagine that the trend could be reversed quickly. The statistics in the United Nations

Schabas, W. (2014), Hard-core Executioners. In Arroyo, L., Schabas, W., Takayama, K., & Muñoz, M. (cords.). *Death Penalty: A Cruel and Inhuman Punishment* (pp. 23-27). Cuenca: Ediciones de la Universidad de Castilla-La Mancha.

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1 UN Doc. E/CN.15/1996/19, pp. 31-34.

2 UN Doc. E/2010/10, p. 7.

reports show that such fears are without foundation. Not only do States that abolish the death penalty in law almost never revert to the practice (Philippines is the only example in recent decades, and its return to capital punishment was of brief duration), those classified as abolitionist *de facto*, because they have not conducted an execution for at least ten years, are virtually as steadfast in their permanent commitment to abolition.

A cautionary note is also struck by those who point out that some of the world's largest States continue to employ the death penalty. Indeed, several of the world's largest States –China, India, the United States, Indonesia, Japan, for example– continue to employ capital punishment. But grouping all States that have conducted one or more executions over the previous decade within the 'retentionist' camp provides a very two-dimensional portrait of what is actually a very complex and diverse reality. To take the two most populous States on the planet, for example, it is not necessarily helpful to our understanding of the phenomenon of capital punishment to equate India and China by branding them both as 'retentionist'. India holds a few executions every decade, and conducts them for murder alone, while China probably imposes capital punishment on about 3,000 people every year and for a range of crimes including many non-violent offences involving narcotic drugs and financial matters. In order to sharpen our understanding of global trends with respect to the death penalty, it is useful to look more closely at the behaviour of those States that still use it.

One useful sub-classification of the retentionist States is to divide them into those that use capital punishment infrequently and those that can be considered 'hard-core', regular and ardent practitioners. The United Nations Secretary-General first distinguished a 'hard-core' retentionist category in the sixth quinquennial report, published in 2000. It did not use the rather pejorative term 'hard-core', of course, but it identified in a distinct statistical table those countries that had executed 20 or more persons over the period from 1994 to 1998³. The same table provided an estimated number of executions per million of population, based on an average of the number of executions over the five-year study period. A similar table appeared in the seventh and eighth quinquennial report. The eighth report provided a comparison of results compiled in the three reports.

The table in this article combines information in the sixth, seventh and eighth quinquennial reports from the Secretary-General, eliminating the data in the seventh report for the sake of brevity. It adds a figure for the four years of 2009 to 2012 based entirely on information in the annual Amnesty International reports. The numbers on which the United Nations and Amnesty International reports are based

3 UN Doc. E/2000/3, p. 13.

come from a range of sources and are acknowledged as estimates in several cases. Sometimes, they have been accompanied with a '+' sign to indicate that there are reasonable grounds to suspect that more executions took place. Moreover, the numbers in the table in this article for the final period, 2009-2012, only cover four years, something that needs to be borne in mind in any comparison. Perhaps a few of the 'Less than 20' States for the four years starting 2009 may creep into the low end of the '20 or More' when the figures for 2013 are added. This cannot significantly change the overall picture, however.

The list of 'hard-core' States for the fourteen-year period 1999-2012 totals 31. There were 26 states on the list in 1999 and there were 15 at the end of 2012. Although this figure alone demonstrates the magnitude of the decline amongst the 'hard core', a few details provide some additional clarity. From the available data it is not possible to know whether the five that have joined the list since 1999 were actually, on closer examination, in the 'hard core' in 1999. Two of them, North Korea and Iraq, were notorious dictatorships associated with brutal justice systems during the 1994-1998 period when the first data were compiled. They may have been left off the list in the sixth quinquennial report because relevant data was not available. Iraq actually went through a period of moratorium during the military occupation in 2003-2004, but executions resumed and the pace has accelerated. Two others, Thailand and Uganda, joined the list in the seventh report but left it in the eighth. Today, Thailand has an unofficial moratorium on capital punishment. Uganda's last execution was in 2006. The fifth State, Kuwait, joined the list in the seventh and remained in the eighth, but its reported executions for the 2009-2012 period suggest it will not appear within the 'hard core' in the ninth report of the Secretary-General which is due to be published in late 2014.

Of the original 26 'hard-core' States on the list for the 1994-1998 period, 10 have now abolished the death penalty in law or in practice: Democratic Republic of the Congo, Kazakhstan, Kyrgyzstan, Russia, Rwanda, Sierra Leone, South Korea, Turkmenistan, Ukraine and Zimbabwe. Ten more have reduced the number of executions to less than 20 and are no longer on the list: Afghanistan, Belarus, Egypt, Japan, Jordan, Nigeria, Pakistan, Singapore, Taiwan and Vietnam. In many of these States, the decline in absolute numbers and in rate of execution has been quite dramatic. Five States that scored over 100 executions for the 1994-1998 period have dropped to fewer than 20: Belarus, Egypt, Singapore, Taiwan and Vietnam. That 20 out of 26 States that were on the 'hard core' list in the 2000 quinquennial report no longer belong on that distinguished list of executioners is a very intriguing indicator.

Of the 'hard core' in the 1994-1998 table, only six remain: China, Iran, Libya, Saudi Arabia, the United States and Yemen. To these States must be added two

that did not appear in that report, Iraq and North Korea. Despite remaining within the hard core, no doubt partly due to the fact that they are among the world's most populous States, both China and the United States recorded significant declines in the number of executions over the period covered on the table that accompanies this article. The figures for the United States are of course utterly reliable and precise while the numbers for China consist of gross estimates based on rumour, anecdote and intuition. China looks as if it has increased for the 2009-2012 period, but only because the earlier United Nations reports were based solely upon confirmed minimum reports, principally from Amnesty International, rather than reasonable estimates. In reality, there can be no doubt that executions in China have declined dramatically in recent years, a consequence of legal reforms and changing attitudes among judicial authorities.

From a regional standpoint, no 'hard core' States remain in Europe and in South and South-East Asia. There are none in the Western hemisphere with the exception of the United States and none in Africa with the exception of Libya. There have been no reports of executions in Libya since the beginning of the 'Arab spring' in February 2011. Aside from China, where very significant reform has taken place recently, and enigmatic North Korea, the only 'hard core' Asian States are in the Middle East. Indeed, this is where the hardest of the 'hard core' remains: Iran, Iraq, Saudi Arabia, Yemen. It is tempting to explain this with cultural and ethnic factors, but that makes it difficult to explain why most Arab and Islamic states also manifest the trend towards reduction in the use of capital punishment if not outright abolition. Pakistan, for example, has had an unofficial moratorium on the death penalty for the past four years. One common denominator of the Middle East States in the 'hard core' that has nothing to do with religion is the persistence of repressive, authoritarian regimes. Were the 'Arab spring' to spread to these countries, perhaps the same lull in executions that is visible in Egypt and Libya would manifest itself.

This analysis of the available data provides a very interesting perspective on developments in capital punishment practice. 'Hard core' or extreme execution is increasingly rare, as the number of States that makes regular use of the death penalty continues to shrink. Whereas a decade and a half ago, there was at least one 'hard core' executioner State in virtually every region of the world, with the exception of South America, today this distinct category of retentionist State is confined geographically to a few areas. This vision of death penalty practice and of the changes it is undergoing should encourage those who aspire to universal abolition. It may also help to inform strategies to promote such a goal.

Countries and territories in which there were reports of at least 20 persons having been executed in any of the periods 1994-1998, 2004-2008 or 2009-2012, with the estimated annual average (mean) rate per 1 million population						
	1994-1998		2004-2008		2009-2012	
	Total executions	Annual rate	Total executions	Annual rate	Total Executions	Annual rate
Afghanistan	34	0.36	33	0.16	Less than 20	
Belarus	103	1.96	Less than 20		Less than 20	
China	12,338	2.01	8,188	1.22	12,000	2.20
DR Congo	100	0.43	0	0	0	0
Egypt	132	0.43	Less than 20		Less than 20	
Iran	505	1.59	1,187	3.29	1,314	4.26
Iraq	Not reported		Not reported		318	2.34
Japan	24	0.04	31	0.05	Less than 20	
Jordan	55	2.12	Less than 20		0	0
Kazakhstan	148	1.74	0	0	0	0
Kyrgyzstan	70	2.80	0	0	0	0
Kuwait	Not reported		28	1.93	0	0
Libya	31	1.17	23	1.93	22	0.88
Nigeria	248	0.41	0	0	0	0
North Korea	Not reported		194+	1.62	96	0.96
Pakistan	34	0.05	323	0.39	Less than 20	
Russia	161	0.2	0	0	0	0
Rwanda	23	0.58	0	0	0	0
Saudi Arabia	465	4.65	423	3.34	257	2.14
Sierra Leone	71	2.84	0	0	0	0
Singapore	206	13.73	22	1.26	Less than 20	
South Korea	57	0.25	0	0	0	0
Taiwan	121	1.13	Less than 20		Less than 20	
Thailand	Not reported		Less than 20		Less than 20	
Turkmenistan	373	14.92	0	0	0	0
Ukraine	389	1.55	0	0	0	0
Uganda	Not reported		Less than 20		0	0
USA	274	0.20	251	0.16	184	0.14
Vietnam	145	0.38	167	0.38	Less than 20	
Yemen	88	1.10	71	0.61	152	1.51
Zimbabwe	22	0.37	0	0	0	0

THE DEATH PENALTY, DETERRENCE AND POLICY MAKING

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«Upon this a question arises: whether it be better to be loved than feared or feared than loved? It may be answered that one should wish to be both, but, because it is difficult to unite them in one person, it is much safer to be feared than loved, when, of the two, either must be dispensed with.» (Machiavelli: The Prince).

INTRODUCTION

Machiavelli knew what many others also know: fear is an incessant companion of humans and thus an important consultant when it comes to human decision-making. The threat of death is therefore assumed to be a powerful instrument in coercing people into compliance. The threat of death appeals to basic human knowledge (and experience) that everybody is vulnerable and ultimately always exposed to physical injuries and complete destruction (for which German sociologist Heinrich Popitz chose the term «Verletzungsoffenheit», literally: openness to traumas¹); the threat of death aims at instilling fear and seeks to build an effective motive for complying with basic criminal norms. The belief in the death penalty as a powerful deterrent has two sides:

- (1) the potential of the ultimate criminal punishment to instigate fear (and terror) in those contemplating the commission of serious crime (in particular murder), and;

Albrecht, H.J. (2014), The Death Penalty, deterrence and Policy Making. In Arroyo, L., Schabas, W., Takayama, K., & Muñoz, M. (cords.). *Death Penalty: A Cruel and Inhuman Punishment* (pp. 29-45). Cuenca: Ediciones de la Universidad de Castilla-La Mancha.

1 POPITZ, H.: *Phänomene der Macht*, 2nd ed., Tübingen 1992.

- (2) the public's perception that withdrawal of this potential will result in shifting the balance towards non-compliance and in the state's failure to protect human life.

Criminal law and punishment theory have endorsed these beliefs in the goal of general deterrence and in the goal of the reinforcement of criminal norms (positive Generalprävention). Criminology has dealt with these questions since the 1950s, from various angles and on the basis of different methods. The bulk of deterrence research originates from the United States, where its advanced research capability scrutinizes the application and enforcement of the death penalty². Other countries where the death penalty continues to be applied on a large scale (China, Iran, Saudi Arabia, Singapore and other Asian countries) either do not have the political will to allow and to launch empirical investigations (in China, because data on the death penalty are considered state secrets) or do not have the research capability to implement in-depth studies on deterrence issues.

At the origin of empirical research focusing on deterrence at large, we find studies, particularly in the U.S., investigating the intended effects of the death penalty³. However, in this context, other (popular) assumptions on the impact of the death penalty have been (and continue to be) examined, such as the 'brutalization hypothesis' (executions lead to an increase in murders)⁴, the dependence of the deterrent effect on the extent of media coverage⁵, or the deferral effect (executions lead to a short term decline in murders, which fades away and leads to an increase after a few days/weeks)⁶.

2 For a complete review see HOOD, R.G./HOYLE, C.: *The death penalty: a worldwide perspective*, 4th ed, New York 2008.

3 ALBRECHT, H.-J.: «Generalprävention», in KAISER, G. et al. (ed.): *Kleines Kriminologisches Wörterbuch*, 3rd edition, Heidelberg 1993, pp. 157-164.

4 BOWERS, W. J.: «The effect of executions is brutalization, not deterrence», in HASS, K.C./INCIARDI, J.A. (eds.): *Capital punishment: Legal and social science approaches*, Newbury Park 1988, pp. 49-89; BAILEY, W.C.: «Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment», *Criminology* 36(1998), pp. 711-736; SHEPHERD, J.M.: «Deterrence versus Brutalization: Capital Punishment's Differing Impacts among States», in *Michigan Law Review* 104(2005), pp. 203-255.

5 PHILLIPS, D. D.: «The deterrent effect of capital punishment: New evidence on an old controversy», in *American Journal of Sociology* 86 (1980), pp. 139-148; SAKAMOTO, A. et al.: *Does the media coverage of capital punishment have a deterrence effect on the occurrence of brutal crimes?: An analysis of the Japanese time-series data from 1959-1990*, Ochanomizu University 2001.

6 McFARLAND, S.G.: «Is capital punishment a short-term deterrent to homicide? A study of the effects of four recent American executions», *Journal of Criminal Law and Criminology*, 74 (1983), pp. 1014-1030.

SEARCHING FOR EFFECTS OF GENERAL DETERRENCE

Initially, cross-sectional and longitudinal comparisons between death penalty states and non-death penalty states (in the US) were used in the study of the death penalty as a deterrence. Besides comparative approaches to the time series of murder rates interrupted by abolition (or introduction) of the death penalty have been investigated, in order to detect a possible impact of capital punishment. These comparisons enabled criminologists to determine that the threat of execution had no effect on the murder rate⁷. During the 1970s, econometric analyses of time series data on executions and murder rates, also described today as «modern (deterrence) studies» by some economists⁸, were undertaken to assess the impact of the death penalty on murder rates. Ehrlich, an American economist, concluded in an econometric study on murder and executions between 1933 and 1969, that an execution prevented 7-8 murders⁹. However, re-analysis of the data found that Ehrlich's strong correlation disappeared, if the last (five) years were taken out of the time series, because there was a large increase in murders and a dramatic decline in executions during the chosen period (as a result of the events that led to the 'unofficial' moratorium on the death penalty in the late 1960s, see graph 1)¹⁰.

In a meta-analysis of the deterrent effects of criminal punishments initiated by the American National Academy of Science¹¹, as early as in 1978, it was pointed out that flaws in econometric analysis exist that have until this day not been remedied¹². The poor validity of the above-mentioned approaches is attributed to the low overall number of death sentences and executions as well as their extreme distribution, due to the fact that the focal points of death penalty activity, after its resumption in 1977,

7 SELLIN, T.: Capital punishment, New York 1967, p. 138; HOOD, R.: The Death Penalty. A World-Wide Perspective, Oxford 1996, pp. 180-212.

8 RUBIN, P.H./DOBBS, S.C.: Statistical Evidence on Capital Punishment and the Deterrence of Homicide, Written Testimony for the Senate Judiciary Committee on the Constitution, Civil Rights, and Property Rights. February 1, 2006.

9 EHRLICH, I.: «The Deterrent Effect of Capital Punishment: A Question of Life and Death», in American Economic Review 65(1975), pp. 397-417; EHRLICH, I.: Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence. Journal of Political Economy 85(1977), pp. 74-88.

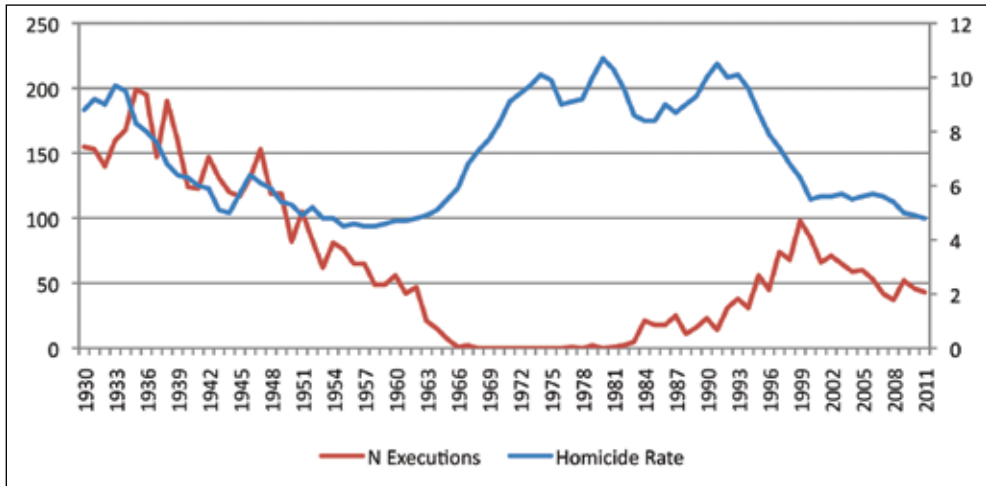
10 Bowers, W. J., Pierce, G.: The illusion of deterrence in Isaac Ehrlich's research on capital punishment. Yale Law Journal, 85(1975), pp. 187-208; YUNKER, J.: «Is the death penalty a deterrent to homicide? Some time series evidence», Journal of Behavioral Economics, 5(1976), pp. 1-32.

11 BLUSTEIN, A. et. al.: Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates, National Academy of Sciences, Washington 1978.

12 KLEIN, L.R. et. al.: «The Deterrent Effect of Capital Punishment: An Assessment of the Estimates», in BLUMSTEIN, A. et al. (eds.): Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates, Washington 1978, pp. 336-360.

had been in Texas and a few other states¹³. Furthermore, other conditions which could explain developments in murder rates are generally not accounted for, especially the possible effect of life imprisonment without parole on the murder rate¹⁴.

**Graph 1: Num. Executions and Murder Rates (/100.000)
United States 1930-2012**



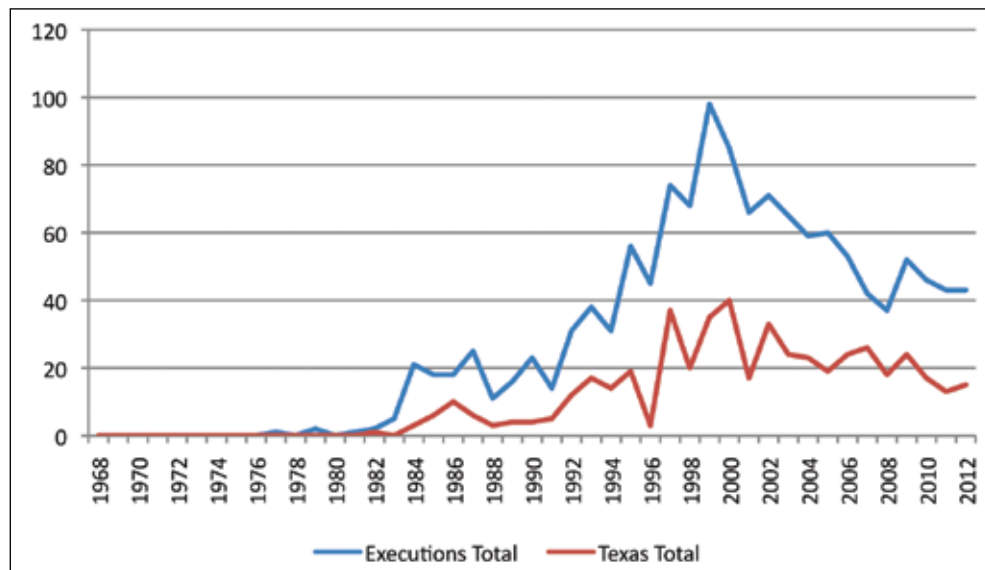
Source: <http://www.deathpenaltyinfo.org/executions-death-sentence>; www.fbi.org.

Econometric analyses are conducted to this day. A second wave of econometric research responded to the so called aggregation problem in the US, in the 1990s, by using panel data for states or counties. The aggregation problem arises as a consequence of the extremely skewed distribution of death sentences imposed and actually enforced across those states where the death penalty is in force. Graphs 2 and 3 give some impression of the magnitude of the aggregation problem. Graph 2 simply displays the course of the death penalty in the United States at large and in Texas. It demonstrates that the deterrent effects of the death penalty should – if at all - be investigated in Texas. The state that accounts for some 13% of all death sentences in retentionist states imposed between 1977 and 2010. In contrast, it has a 38% share of all executions carried out in that period.

13 DONOHUE, J.J./WOLFER, J.: The Death Penalty: No Evidence for Deterrence, The Berkeley Electronic Press, April 2006, pp. 1-6.

14 FAGAN, J.: «Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment», Ohio State Journal of Criminal Law 4(2006), pp. 255-320, pp. 269.

Graph 2: Executions in the US and in Texas (1968-2012)



Source: <http://www.deathpenaltyinfo.org/executions-death-sentence>.

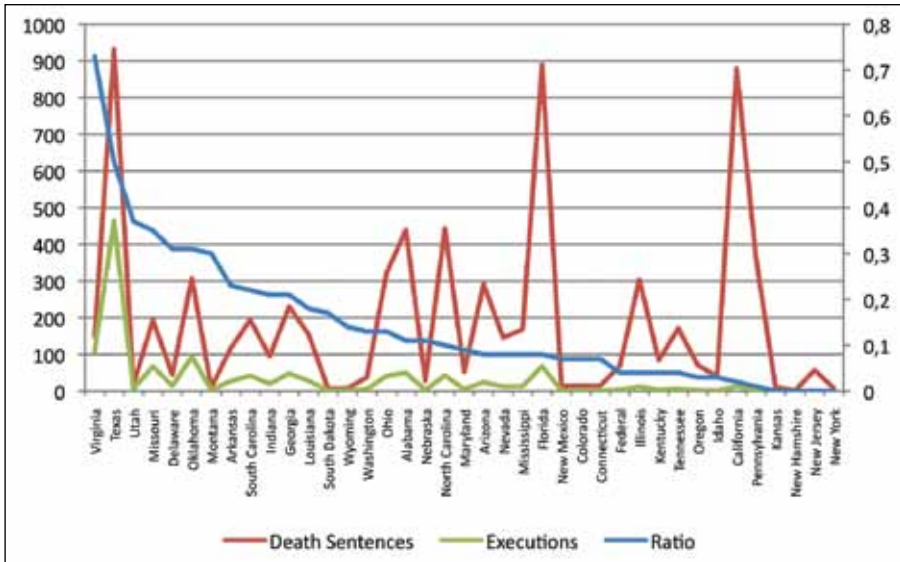
While Texas accounts for a significant share of those death penalties that have been imposed and enforced, most of the death penalty retaining states do not contribute at all to the overall number of executions. In fact, Texas, Oklahoma, Florida, Virginia, Ohio, Georgia and Missouri have carried out approximately 70% of the executions between 1977 and 2012, while states with a high share of death penalty sentences that have been imposed and a high share of death-row inmates have, quite evidently, almost completely ceased to enforce the death penalty (California, Pennsylvania, see graph 3).

Graph 3 conveys the message that the probability of being executed after being sentenced to death varies to an extreme. Some 70% of death sentences are enforced in Virginia, no executions have been observed in Kansas and some states in the Northeast of the US.

The results from the «new generation» of econometric studies on the deterrent effect of the death penalty are mixed and vary widely¹⁵. One study reported that between 1977 and 1997 one execution would prevent five murders and that the commutation of a death sentence to life imprisonment would result in five additional

15 WEISBERG, R.: «The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny», *Annual Review of Law and Social Sciences* 1(2005), pp. 151-70.

Graph 3: Ratio Death Sentences/Executions across Death Penalty Retaining States in the United States (for the period 1977-2010)



Source: <http://www.deathpenaltyinfo.org/executions-death-sentence>.

murders¹⁶. Another study concluded that one execution could prevent as many as eighteen murders¹⁷. However, the prevention of eighteen murders was outdone when a 2007 study claiming that one execution would save 74 lives¹⁸. Yet a further econometric study found that one execution would prevent three murders and stated that the effect was unrelated to the type of murder (crimes of passion are as easily deterred by capital punishment as stranger-to-stranger homicides)¹⁹. Moreover, a 2.75 year reduction in waiting time on death row should result from the prevention of one additional murder. In the latest study of this kind conducted in Texas, the results demonstrated the existence of a measureable deterrent effect of the death

16 MOCAN, H.N./GITTINGS, R.K.: «Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment», *Journal of Law and Economics* 46(2003), pp. 453-478, p. 453.

17 DEZHBAKHSH, H., RUBIN, P.H., SHEPHERD, J.M.: Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data. *American Law and Economics* 5(2003); pp. 344-376, p. 344.

18 ADLER, R.D., SUMMERS, M.: Capital Punishment Works. *Wall Street Journal* Friday, November 2, 2007.

19 SHEPHERD, J.M.: Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment *Journal of Legal Studies* 33(2004), pp. 283.

penalty, though the effect was estimated at the prevention of 0.5 homicides per execution²⁰. A zero-correlation between executions and the murder rate was reported by Katz/Levitt/Shustorovich, who instead found deterrence in the form of a correlation between prison conditions (measured by the number of deaths in prisons) and the crime rate²¹. Econometric research therefore sometimes comes up with correlations that hardly lend themselves to plausible theoretical interpretation. This is for example the case when it is asserted that the deterrent effect of capital punishment will depend on the number of persons executed. Findings suggesting that the impact of executions differs between death penalty retaining states (in some 20% of these states the death penalty deters, while in the remaining 80% the death penalty had no impact or even increased the number of murders)²², Shepherd concluded that a threshold exists that turns a brutalization effect into a deterrence effect. While more than 9 executions (per year) deter, less than 9 executions either have no effect on murder rates or result in an increase in murder rates. This in turn results in the strange recommendation either to execute more than nine or to refrain completely from executions²³. Another study found that a commutation of a death sentence will add 5 additional murders while any other removal from death row (through death by natural causes or murder by another inmate) will yield only one additional murder²⁴. It is difficult to understand why the impact of commutation should differ so very much from «removal» from death row.

Econometric analyses have been carried out with Canadian data on executions and murder rates. A study covering the period 1927 – 1960 found no significant effect²⁵, while a subsequent study (using an extended time series of 1927 – 1977) supported claims of a deterrent effect of the death penalty in Canada²⁶. Rather than identifying any deterrent effect of the death penalty, time series analyses of Japanese

20 LAND, K.C./TESKE, R.C./ZHENG, H.: «The Short-Term Effects of Executions on Homicides: Deterrence, Displacement, or Both?», in *Criminology* 47(2009), pp. 1009-1043, which demonstrated that per execution in Texas 2.5 murders were prevented, though over an extended period of 12 months the rate of prevented murders dropped to 0.5.

21 KATZ, L./LEVITT, S.D./SHUSTOROVICH, E.: «Prison Conditions, Capital Punishment, and Deterrence», *American Law and Economics Review* 5(2003), pp. 318-343, p. 318.

22 SHEPHERD, J.: «Why not all executions deter murder», in *The Christian Science Monitor*, December 14, 2005.

23 SHEPHERD, J.M.: «Deterrence versus Brutalization: Capital Punishment's Differing Impacts among States», *Michigan Law Review* 104(2005), pp. 203-255.

24 MOCAN, H.N./GITTINGS, R.K.: opus cited 2003, p. 469.

25 AVIO, K.: «Capital punishment in Canada: a time-series analysis of the deterrent hypothesis», *Canadian Journal of Economics* 12 (1979), pp. 647-676.

26 LAYSON, S.: «Homicide and Deterrence: Another View of the Canadian Time Series Evidence», *Canadian Journal of Economics* 16(1983), pp. 52-73.

murder and execution data between 1959 and 1990 revealed the opposite: executions were followed by an increase in the number of murders²⁷.

According to Rubin, the literature documenting econometric research on deterrent effects of capital punishment is easy to summarize. He argues that most «modern studies» find «a significant deterrent effect of capital punishment», while not considering that this effect can evidently lie anywhere between 0 and 18 murders prevented by one additional execution (variation of effects of course also include negative values, i.e. each execution results in additional murders. This is the case in two of four models analysed by Katz/Levitt/Shustorovich²⁸). Different models used in econometric analysis evidently produce significant variations. For economists, Rubin continues, this should not be surprising as economists expect potential criminals to respond to the threat of criminal sanctions²⁹. However, this conclusion is evidently unfounded. The economic argument is characterized, as Fagan has insisted, by persistent claims of having identified a strong causal relationship between death sentences, executions or other death-penalty related variables and the murder rate³⁰. In testimony before the New York legislature, Fagan summarized the critique of «econometric» studies carried out since the first wave in the 1970s. He claimed that those studies produced «erratic and contradictory results» and doubts that treating all forms of murder alike and assuming that they can all be equally deterred will yield meaningful results. Fagan then pointed to the failure to control for auto-regression and stressed that there should be more consideration for key variables, reflecting particular performance measures of the criminal justice system, specifically clearance rates for violent crimes. Moreover, the lack of direct tests of deterrence and other possible causes for the increases and decreases in murder rates, widely discussed in the criminological literature on murder, which peaked twice in the 1970s and at the end of the 1980s, and the unprecedented drop in murder rates since the beginning of the 1990s (see graph 1), are not considered. The spread of violent crack-cocaine markets, gang violence and the wide availability of assault rifles fall

27 SAKAMOTO, A. et al.: Does the media coverage of capital punishment have a deterrence effect on the occurrence of brutal crimes?: An analysis of the Japanese time-series data from 1959-1990, Ochanomizu University 2001.

28 KATZ, L./LEVITT, S.D./SHUSTOROVICH, E.: opus cited, 2003; see also DONOHUE, J.J./WOLFERS, J.: «The Death Penalty: No Evidence for Deterrence», *Economists Voice*, April, 2006, p. 4, at www.bepress.com/ev.

29 RUBIN, P.H.: «Statistical Evidence on Capital Punishment and the Deterrence of Homicide», Written Testimony for the Senate Judiciary Committee on the Constitution, Civil Rights, and Property Rights, February 1, 2006, p. 10.

30 FAGAN, J.: «Deterrence and the Death Penalty: A Critical Review of New Evidence», Testimony to the New York State Assembly Standing Committee on Codes, Assembly Standing Committee on Judiciary and Assembly Standing Committee on Correction, Hearings on the Future of Capital Punishment in the State of New York, 21 January 2005, p. 5.

outside the focus of econometric research. Analysis of the development of murder rates after collapsing retentionist US-States into three categories of «many executions», «few executions» and «no executions» shows that the decrease of murder rates is highest in «no execution» states, somewhat lower in «many executions» states and lowest in «few executions» states³¹. That could be interpreted as a slightly stronger effect of «no executions» on murder than «many executions»; however, the best interpretation seems to assume that murder rates and executions are simply unrelated³². Finally, it should also be kept in mind that there exists a divide between economists and criminologists as regards assessments of deterrence through the death penalty. Criminologists have adopted far more cautious assessments of general deterrence, in general, and deterrence exerted through executions. A recent review of (new generation) econometric deterrence studies supports this view. It finds that research is inconclusive and concludes that there is not much room left to solve the fundamental methodological and theoretical problems, which accompany evidence purporting that the death penalty has or does not have a deterrent effect³³.

Econometric studies conducted on the ratio of lives saved per execution have nevertheless proven effective at fuelling political and public debates as well as generating wide media coverage. These findings in the US have also been the subject of parliamentary hearings on the pros and cons of reinstating the death penalty³⁴. The debates on promises of saving life through executing criminals are similar to recent discourse on the so-called 'rescue torture' and the pre-emptive shooting down of a hijacked aircraft to prevent its use as a weapon³⁵. In this way, deterrent effects and

31 MALES, M.: *Death Penalty and Deterrence: The Last Word*, Center on Juvenile and Criminal Justice, April 2008.

32 MALES, M.: *opus* cited 2008, p. 2.

33 CHALFIN, A./HAVILAND, A.M., RAPHAEL, S.: «What Do Panel Studies Tell Us About a Deterrent Effect of Capital Punishment? A Critique of the Literature», *Journal of Quantitative Criminology* 29(2013), pp. 5-43, p. 41.

34 FAGAN, J.: «Deterrence and the Death Penalty: A Critical Review of New Evidence», Testimony to the New York State Assembly Standing Committee on Codes, Assembly Standing Committee on Judiciary and Assembly Standing Committee on Correction, Hearings on the Future of Capital Punishment in the State of New York, 21 January 2005; FAGAN, J.: «Public Policy Choices on Deterrence and the Death Penalty: A Critical Review of New Evidence», Testimony before the Joint Committee on the Judiciary of the Massachusetts Legislature on House Bill 3834, «An Act Reinstating Capital Punishment in the Commonwealth», 14 July, 2005; RUBIN, P.H.: *Statistical Evidence on Capital Punishment and the Deterrence of Homicide*, Written Testimony for the Senate Judiciary Committee on the Constitution, Civil Rights, and Property Rights Atlanta, 1 February, 2006; MUHLHAUSEN, D.: *The Death Penalty Deters Crime and Saves Lives*, Testimony delivered on June 27, 2007, before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Committee on the Judiciary of the United States Senate.

35 BOWDEN, M.: «The Dark Art of Interrogation», *The Atlantic Monthly*, October 2003; BRUGGER, W.: «Darf der Staat ausnahmsweise foltern?», *Der Staat* 35(1996), pp. 67-97; JAHN, M.:

the prevention of murder are weighed up against the execution of a guilty offender³⁶, as the use of torture on a suspect is weighed up against information on the whereabouts and chances of saving the life of a kidnapped victim or information on the location of weapons of mass destruction primed for use. Utilitarian arguments don a moral cloak if the continued existence of the condemned individual may lead to the death of innocent people and argue in favour of the state proceeding with the execution. Whilst consideration of the use of torture to save the life of many innocents is alarming enough in itself, it is, of course, in blatant violation of international and national norms. What is still more alarming is that the underlying empirical research is full of uncertainties. Data is obtained through statistical instruments and models in a discipline that is unable to predict the rise and fall of the U.S. dollar with accuracy; though it would like to suggest that a single execution will prevent 0, 5, 3, 5, 7, 18 or 74 murders. On the basis of such data, one can also predict that the non-execution of convicted offenders in states where the death penalty is not used for murder would lead to the same reduction in murders³⁷. Similar arguments have also been observed in connection with another sensitive topic – the right to own firearms³⁸.

Conversely, discussions on deterrence based on the intuitive plausibility of trends and distributions, such as the type of research conducted by Sellin and others³⁹, have been passed over in the discussions on the uncertainties of mathematics, the specification of models and their statistical validation. Yet, it is the results of studies which compare different states and countries and trends over time that demonstrate that the death penalty provides no real deterrent⁴⁰. After all, the likelihood of execution on death row for males in the U.S. is only double the likelihood of a person dying in a violent criminal incident or accident outside prison. As was also noted, mortality rates

«Gute Folter – Schlechte Folter? Straf-, verfassungs- und völkerrechtliche Anmerkungen zum Begriff «Folter» im Spannungsfeld von Prävention und Repression», *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 87(2004), pp. 24-49; KREUZER, A.: «Zur Not ein bisschen Folter? Diskussion um Ausnahmen vom absoluten Folterverbot anlässlich polizeilicher «Rettungsfolter», in NITSCHKE, P. (ed.): *Rettungsfolter im modernen Rechtsstaat? Eine Verortung*, Bochum 2005, pp. 35-49.

36 SUSTEIN, C.R./VERMEULE, A.: «Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs», *Stanford Law Review* 58(2005), pp. 703-750.

37 MALES, M.: *Death Penalty and Deterrence: The Last Word*, Center on Juvenile and Criminal Justice, April 2008, www.cjcj.org.

38 BRONARS, S.G./LOTT, J.R.: «Criminal Deterrence, Geographic Spillovers, and the Right to Carry Concealed Handguns», *The American Economic Review* 88(1998), p. 475-479; DEZHBAKHASH, H./ROBIN, P.H.: «Lives Saved or Lives Lost? The Effects of Concealed-Handgun Laws on Crime», *The American Economic Review* 88(1998), p. 468-474.

39 SELLIN, T.: *The death penalty*, Philadelphia 1959.

40 LAMPERTI, J.: *Does Capital Punishment Deter Murder? A brief look at the evidence*, <http://www.math.dartmouth.edu/~lamperti/my%20DP%20paper,%20current%20edit.htm>.

outside prison for individuals in street gangs or those involved in the illicit drug trade are likely to be significantly higher than for those awaiting execution on death row⁴¹.

The burden of proof to demonstrate the deterrent effect of the death penalty must lie with the state that uses or introduces it⁴². Whilst it is certainly not to be expected that the deterrence debate will conclude in the near (or distant) future, it would also appear that no plausible evidence can be provided to demonstrate in a convincing way that a deterrent effect exists⁴³. The perception that the death penalty deters is based on belief⁴⁴. In this regard, general preventive grounds do not offer a viable basis to support the death penalty. This is also the conclusion of a recent report on the deterrent effects of the death penalty commissioned by the National Academy of Sciences. More than thirty years after publication of the 1978 report on deterrence⁴⁵, the new report offers virtually the same results. The 2012 report says that «research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates». The report therefore recommends that political decisions on the death penalty should not be influenced by «claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate»⁴⁶.

BELIEF IN DETERRENCE, PUBLIC OPINION AND THE DEATH PENALTY

When the President of Mongolia three years ago announced his political will to abolish the death penalty⁴⁷ the response of the Parliament was overly negative⁴⁸. The negative response of (most) members of Parliament to the proposed abolition of the

41 KATZ, L./LEVITT, S.D./SHUSTOROVICH, E.: «Prison Conditions, Capital Punishment, and Deterrence», *American Law and Economics Review* 5(2003), pp. 318-343, pp. 319-320.

42 GRAHL-MADSEN, A.: «The Death Penalty. The Moral, Ethical, and Human Rights Dimensions: The Human Rights Perspective», *Revue Internationale de Droit Pénal, La Peine de Mort. The Death Penalty. Travaux de la Conférence Internationale tenue à l'Institut Supérieur International de Sciences Criminelles Syracuse – Italy. 17 to 22 May 1988. 58(1987)*, pp. 567-582, p. 579.

43 For more information, see CHAN, J./OXLEY, D.: «The deterrent effect of capital punishment: A review of the research evidence», *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice. NSW Bureau of Crime Statistics and Research*, October 2004.

44 DONOHUE, J.J./WOLFERS, J.: «The Death Penalty: No Evidence for Deterrence», *Economists' Voice*, April, 2006, p. 5, at www.bepress.com/ev.

45 BLUMSTEIN, A. et al. (eds.): *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, Washington 1978.

46 DANIEL, S./NAGIN, D.S./PEPPER, J.V. (eds): *Deterrence and the Death Penalty. National Research Council, National Academy of Sciences*, Washington 2012, p. 2.

47 www.president.mn, The Office of the President of Mongolia, Public relations & Communications Division «The Path of Democratic Mongolia Must be Clean and Bloodless», 2010-01-14

48 Times Online, January 15, 2010, Mongolia to abolish the death penalty.

death penalty is a likely consequence of the perception that the public overwhelmingly supports the death penalty. Public opinion is also relied on in other countries to justify its retention⁴⁹. This justification is based not only on the view that the death penalty deters murder, but also on the idea of positive general prevention. According to propositions of positive general prevention, the public must maintain confidence in the criminal justice system as well as in the system of criminal norms. Confidence can be maintained only if the public is of the opinion that criminal norms are reinforced through effective punishment. A criminal justice system falling short of such expectations will lose trust and ultimately encourage disappointment and weakening of normative appeals. In all death penalty retaining countries, a large sector of the public expresses support for the death penalty in case of murder. It is feared that not honouring this support will result in the public's view that the state does not do enough to protect human life.

In this regard, however, several questions emerge. First, attitudes on the death penalty are affected by a variety of conditions and are obviously not stable. Empirical studies have demonstrated that support for the death penalty drops when the alternative 'life imprisonment without parole' is offered⁵⁰. Attitudes to the death penalty strongly correlate therefore with educational levels: the higher the level of education, the lower the support for the death penalty. From a European view, it has been said that the political process of abolishing the death penalty was initiated in periods where a (sometimes overwhelming) majority of the public endorsed the death penalty. Examples from the United Kingdom, France, Germany, and the new democracies of Eastern Europe provide evidence that an opposing view expressed by the public should not be a decisive factor in political decision-making, neither should it result in an opposing view in serious conflicts, nor in less support for those political parties that support the abolition process. The abolition process in European countries (insofar as these processes fall within the period after the Second World War) is characterized by particularities. Germany abolished the death penalty in response to the atrocities of the Nazi-regime (with no regard given to the public opinion as abolition was not discussed from the viewpoint of instrumental

49 For example, see for China TENG, H.Y.: «On the Death Penalty at the Turning of the Century», in NOWAK, M./XIN, C. (eds.): *EU-China Human Rights Dialogue, Proceedings of the Second EU-China Legal Expert Seminar held in Beijing on 19 and 20 October 1998*. Vienna 2000, pp. 88-94, p. 93; SCHABAS, W.A.: «Public opinion and the death penalty», in HODGKINSON, P. (ed.): *Capital Punishment. Strategies for Abolition*, Cambridge, 2004, pp. 309-331.

50 For the U.S. see RICHARD, C.D.: *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, Death Penalty Information Center, Washington, April 1993; Death Penalty Information Center: *The Death Penalty in 2010. Year End Report*. Washington, December 2010, p. 1; for China see OBERWITTLER, D./SHENGHUI, Q.: *Public Opinion on the Death Penalty in China*, Freiburg 2009, p. 15.

or expressive properties of the death penalty). In France, abolition of the death penalty signalled the arrival of the socialist government and the closure of a period dominated by conservative politics. In the United Kingdom, arguments in support of abolition centred around wrongful convictions. Then, from the 1970s on, a dynamic developed within the framework of the Council of Europe and the European Union that resulted in the immediate abolition of the death penalty in the new democracies after 1990 (where abolition of the death penalty also served as a symbol separating the new democracies from the preceding authoritarian regimes).

Support for the death penalty is liable to change over time. In Germany (as well as in other European countries), when the death penalty was abolished in 1949, it was subsequently observed that public support for it dwindled away⁵¹. At the time of abolition, a majority of the German public supported the death penalty; 50 years later the rate had dropped to 23% (see graph 4). The key shift in public opinion (the point when a majority for the first time opposed the death penalty) occurred toward the end of the 1960s⁵² and was in all likelihood related to the period's distinctive social and political change. In France, the death penalty was abolished in 1981, shortly after socialist President Mitterand took office and when public opinion clearly favoured the death penalty. French public opinion after abolition slowly changed course. In the new Millennium, supporters of the death penalty have turned into a minority. As such, it is over a longer period of time that a clear majority against the death penalty emerges that corresponds with the legislative changes initiated by the government. Also in Russia, where a moratorium on the death penalty has prevented executions since 1996, changes in public opinion can be seen. According to a poll by the Yury Levada Analytical Center, 37% of those interviewed in 2009 wanted the death penalty to be reinstated; in the year 2000, the proportion of supporters was much higher and stood at 54%⁵³.

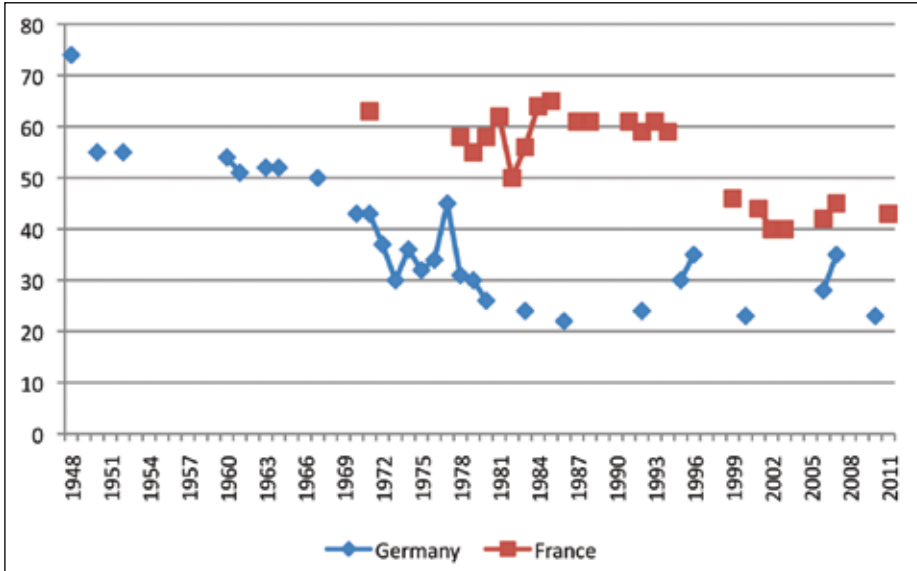
From a criminal policy perspective, the question that ultimately needs to be asked is whether public opinion should be allowed to dictate the political fate of the death penalty. Of course, effective criminal penalties require general societal support so that the legitimacy (and acceptance) of the law is not threatened. However, limits to the role of public opinion must exist. Indeed, in the various forms of representative democracy, political parties perform an important function to help determine the political agenda and act as pace setters of public opinion. Evidence that public opinion on the death

51 REUBAND, K.-H.: «Sanktionsverlangen im Wandel. Die Einstellung zur Todesstrafe in der Bundesrepublik Deutschland seit 1950», *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 32(1980), pp. 535-558.

52 REUBAND, K.-H.: opus cited, 1980, p. 342.

53 www.angus-reid.com/polls/view/fewer_russians_would_restore_death_penalty/

Graph 4: Public Support for the Death Penalty (% favouring the death penalty) in Germany (abolition of death penalty 1949) and France (abolition of death penalty 1981)



Source: www.ifd-allensbach.de/news/prd_0214.html; Baier, D. et al.: *Kriminalitätsfurcht, Strafbefürfnisse und wahrgenommene Kriminalitätsentwicklung*. Hannover 2011, S. 62; http://www.tns-sofres.com/etudes/pol/231001_peinedemort.htm

penalty is inconsistent and highly prone to fluctuations⁵⁴ underlines the importance of political parties and the political elite in shaping public opinion and eventually abolishing the death penalty⁵⁵. For years, research has shown that public opinion on the death penalty alters when different polling methods are used as opposed to the standard ‘for or against the death penalty’ question. For example, in a recent poll in the U.S. on the penalty for murder that provided the options ‘death penalty,’ ‘life without parole plus restitution,’ ‘life without parole,’ and ‘life with parole,’ only 33%

⁵⁴ ZIMRING, F.E./HAWKINS, G.: The Path toward the Abolition of Capital Punishment in the Industrial West, GRAHL-MADSEN, A.: «The Death Penalty. The Moral, Ethical, and Human Rights Dimensions: The Human Rights Perspective», *Revue Internationale de Droit Pénal, La Peine de Mort. The Death Penalty. Travaux de la Conférence Internationale tenue à l’Institut Supérieur International de Sciences Criminelles Syracuse – Italy*. 17 to 22 May 1988. 58(1987), pp. 669-688, p. 680.

⁵⁵ ZIMRING, F./HAWKINS, G.: *Capital Punishment and the American Agenda*, Cambridge 1986; KELLEY, J./BRAITHWAITE, J.: «Public Opinion and the Death Penalty in Australia», *Justice Quarterly* 7(1990), pp. 529-563.

of respondents supported the death penalty⁵⁶. However if the standard ‘for or against’ question is used, then two thirds of those asked favour the death penalty⁵⁷. So far, the abolition of the death penalty – in the face of broad public support – has not had a long term detrimental effect on political elites or political parties. On the contrary, political elites can play a vital leadership role: whilst abolishment may not be popular, research shows that this will change over time, until the overwhelming public view matches the previous political decision⁵⁸. In France, a public opinion survey on the political achievements of the late President Mitterrand shows that his push for abolition of the death penalty was ranked higher than any other⁵⁹. This finding corresponds with research results on the link between criminal policy and public opinion in general. It is politicians that determine the criminal policy agenda and, consequently, the shape of public opinion and public awareness (on specific political issues)⁶⁰.

Interesting results come from a longitudinal survey carried out annually with students enrolling at the law school of the University of Giessen⁶¹. The survey covers attitudes towards the death penalty. The time series (1976 – 2003) demonstrates that opposition to the death penalty declined considerably. While in 1976, some 75% of respondents voiced their opposition to the death penalty, this share dropped to 42% in 2003. But, the share of supporters of the death penalty increased only slightly from some 5% in 1976 to 17% in 2003; however, the most pronounced surge was in the number of those who declared themselves undecided with regard to opposition or support of the death penalty. While the share of the undecided was approximately 20% in 1976, in 2003 more than 40% were undecided. It appears that among young people in Germany, strict opposition to the death penalty has lost ground; this does not mean that young people take the opposite view, but, changes can perhaps be interpreted as a move toward neutrality and/or as a reflection of a growing uncertainty as to how systems of criminal punishment should develop in the future. The growing number of undecided persons might be evidence that the path to abolition is not irreversible⁶², but that support for the death penalty can build up again.

56 Death Penalty Information Center: *The Death Penalty 2010. Year End Report*. Washington 2010, p. 1.

57 GALLUP: In U.S., 64% Support Death Penalty in Cases of Murder, 8 November 2010.

58 KELLEY, J./BRAITHWAITE, J.: «Public Opinion and the Death Penalty in Australia», *Justice Quarterly* 7(1990), pp. 529 – 563.

59 <http://www.ipsos.fr/ipsos-public-affairs/sondages/francois-mitterrand-bilan-contraste-quatorze-annees>.

60 BECKETT, K.: *Making Crime Pay: Law and Order in Contemporary American Politics*, Oxford 1997; BECKETT, K.: «Political Preoccupation with Crime», *Overcrowded Times* 8(1997), pp. 1, 8-11.

61 KREUZER, A.: «Vergleichende Online-Delinquenzbefragung Gießen-Madison 2003», in DAMM, R./HEERMANN, P.W./VEIL, R. (eds): *Festschrift für Thomas Raiser zum 70. Geburtstag*, Berlin 2005, pp. 539-558.

62 KREUZER, A.: »Die Abschaffung der Todesstrafe in Deutschland – mit Vergleichen zur Entwicklung in den USA“, *Zeitschrift für Internationale Strafrechtsdogmatik* 8(2006), pp. 320-326, p. 320.

There is yet another angle from which questions of public opinion can be raised. In retentionist countries, the death penalty is sometimes justified with new threats emerging as economic, social and cultural conditions change. Corruption, drug trafficking, economic crime, counterfeiting, and human trafficking are certainly an expression of rapid economic transition and at the same time new liberties. Together with a public strongly voicing the demand for death penalty (most probably through local emotions, the media and internet blogs), new threats and the need to prevent social instability, this argument serves to justify policy-making which accepts abolition of the death penalty as a goal but delays abolition to a faraway future. It also allows criminal policy to focus decision-making on those (new) threats which are closely associated with insecurity and in particular feelings of insecurity.

CONCLUSIONS

Under what conditions can calls for tough punishment (including the death penalty) be expected and under what conditions are law makers and politicians likely to justify harsh punishment with public demands for such punishment? Recent research in Western countries has demonstrated that punitive attitudes are closely linked to feelings of insecurity⁶³. Feelings of insecurity are again closely associated with distrust. The more distrust towards the state and state institutions is observed, the more the public is affected by insecurity. Such a path – rapid change, distrust, insecurity and demand for harsh punishment – can be explained. However, it provokes the question of what alternatives are available to respond to insecurity and distrust, which certainly cannot be totally avoided in periods of significant economic transitions. Internationally, comparative research shows that distrust is strongly correlated with social insecurity and uncertainty as regards the future⁶⁴. The more people feel secure and the less they feel uncertain about their fate, the more they trust state institutions and the less they will voice demand for harsh punishment. Almost more important, however, are the concerns that under such conditions politicians will not even have recourse to severe punishments.

Criminal policy and standards of criminal policy therefore have to be embedded (again) in a general social policy, which makes serious attempts to reduce uncertainty and insecurity and to generate vertical and horizontal trust.

63 HUMMELSHEIM, D. et al.: «Social Insecurities and Fear of Crime: A Cross-National Study on the Impact of Welfare State Policies on Crime-related Anxieties», *European Sociological Review* 27(2011), pp. 327-345.

64 LAPPI-SEPPÄLÄ, T.: «Trust, Welfare, and Political Culture: Explaining Differences in National Penal Policies», in TONRY, M. (ed.): *Crime and Justice. A Review of Research*, Vol. 37, Chicago, London 2008, pp. 313-387.

ABOLITION OF THE DEATH PENALTY FOR DRUG CRIMES

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The International Society of Social Defence (ISSD), established in 1949, and an active participant in the first Crime Congress of 1955, has always been against the death penalty and committed to humanist criminal law. Our President, for so many years, Marc Ancel, was precisely the first general rapporteur on the question of the death penalty, both for the United Nations and the Council of Europe². Marc Ancel was, with regard to the death penalty, the general rapporteur to the Secretary-General; the grandfather, if you like, of Roger Hood and William Schabas.

Arroyo Zapatero, L. (2014), Abolition of the Death Penalty for Drug Crimes. In Arroyo, L., Schabas, W., Takayama, K., & Muñoz, M. (cords.). *Death Penalty: A Cruel and Inhuman Punishment* (pp. 47-57). Cuenca: Ediciones de la Universidad de Castilla-La Mancha.

1 Presented at the one-day conference on «The use of the death penalty in drugs trafficking crimes», organized by the Academic Council on the United Nations System (ACUNS) on the occasion of the meeting of the UNODC Drugs Committee in Vienna, 12 March 2013. English version of Antony Price.

2 ANCEL, M.: The death penalty. Part I: Evolution until 1960 and Part II: Evolution from 1961 to 1965. Department of Economic and Social Affairs, New York, United Nations. 1968. Also available in Spanish and french. For the European context, see ANCEL, M.: La peine de mort dans les pays européens. Rapport. Conseil de l'Europe. 1962. On the origins of the ISSD, see: Arroyo Zapatero, L.: Soixantième anniversaire de la Société Internationale de Défense Sociale. 2009-2010 "Cahiers de Défense Sociale", 1949-2009: L'esprit des temps. Pp. 11-16. 2010.

Academics for Abolition was founded in December 2009 in Madrid, under the sponsorship of the Spanish Government, to cooperate with the International Commission against the death penalty, which would be created in 2010, as well as with Governments and NGOs committed to abolition. The basis of Academics for Abolition was an agreement on cooperation between four major scientific associations: AIDP (*International Penal Law Association*), ISSD (*International Society of Social Defense*), ISC (*International Society for Criminology*) and FIPP (*Penal and Penitentiary International Foundation*), prepared in the Hague in April 2009, on the occasion of the Conference organized by Cherif Bassiouni as the closing event of the impunity research project³. The four associations had already met in 1989, at the Institute of Syracuse, in a specific Congress about and against the death penalty⁴. The founder and President of the ISSD, Filippo Grammatica, had in 1947 previously presented his proposal for the abolition of the death penalty, following the Nuremberg executions.

Academics –scholars– study matters and publish books and articles in scientific journals, and the Network has, since April 2010, had five books published in Spanish, one in English and a DVD-book «Still killing» in English and Spanish, now also in Arabic. All of this is available on-line at our website www.academicsforabolition.net⁵. Over the coming months, Academics for Abolition will be involved in the preparations for the fifth World Congress organized by the World Coalition in Madrid from 12-15 June.

Before approaching the main issue of this side-event, I would like to discuss certain ideas. Some preliminary observations are in order, before approaching the matter under study, which refers, in the first place, to the recognition of the problem of drugs trafficking and drug consumption as a serious social problem. One of these observations is the stimulus in International Law given to the suppression of the death penalty, and another, is that all debate surrounding the death penalty, its abolition and its limitations should take place in the temporal and political context of the Millennium Declaration.

3 BASSIOUNI, CH.: *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*. Brussels. Ed. Intersentia, 2010.

4 La peine de mort-The death penalty, in «*Revue Internationale de Droit Pénale*», Conférence à Syracuse, Italy, (58) 1987 p. 285 -914.

5 ARROYO ZAPATERO, L.: *Towards a universal moratorium on the death penalty*, in ARROYO, L./BIGLINO, P./SCHABAS, W. (eds.), *Presentation by Jose Luis Rodríguez Zapatero, Towards a universal moratorium on the death penalty*, Valencia. Ed. Tirant lo Blanch 2010; ARROYO, L./BIGLINO, P./SCHABAS, W. (eds.), *Presentation by Jose Luis Rodríguez Zapatero, Hacia la abolición universal de la pena capital*, Valencia: Ed. Tirant lo Blanch 2010. Vicente R., *Las artes contra la pena de muerte*. Tirant lo Blanch, Valencia, 2010; ARROYO, L./BIGLINO, P./SCHABAS, W. (eds.): *Contra el espanto*. Tirant lo Blanch, Valencia, 2012.

THE RELEVANCE OF THE PROBLEM OF DRUGS TRAFFICKING

I would like to make an opening statement: drugs trafficking constitutes a very important socio-economic problem and a difficult task for criminal policy.

In contemporary debates, in the West, it is often forgotten that the first war on drugs and drugs trafficking known to humanity was a tragic upside-down war: China, a country overwhelmed by the threat of an entire generation affected by massive opium consumption established a prohibition on its production and trafficking. However, a well-advanced European country, the UK, declared war on China to impose freedom of trade, expressly including the drugs trade. There were two opium wars between 1839 and 1860⁶.

This conflict reveals the origins and the reasons for the prohibition of trafficking and the conflicts of interest in drug-related matters, as well as the serious nature of drug trafficking, a serious enough problem for war to be declared. In consequence, drugs trafficking is a serious matter. But whether drugs trafficking is a serious crime among those envisaged in international legislation is a different question all together. It is not to be treated lightly and even if considered serious, its significance might vary considerably, as I will explain later on.

The second idea covers the radical trend, over the last 40 years, in the reduction of the scope of application of the death penalty as a global criminal punishment, both in the retentionist countries and with regard to the kinds of crimes for which the death penalty is imposed. Since the elaboration of the Universal Declaration of Human Rights and the beginning of the international debate on the abolition of the death penalty, humanity has come a long way in very different areas. The configuration and the content of each area of human rights in the Declaration has progressed, with regard to its interpretation, and in conventions and international protocols. All this is still subject to a lot of debate and especially in what concerns the death penalty: the scope of the right to life and its exceptions; the significance of the prohibition of cruel and inhumane penalties and the proclamation of safeguards in the retentionist countries.

In fact, a meeting point between the members of the international community, between abolitionists and retentionist countries, was the adoption of Safeguards Guaranteeing Protection of those facing the Death Penalty, proclaimed for the first time in 1984, which interpreted the spirit of art.6 of the Convention and were intended to end the discussion. Most of the safeguards relate to the definition of

6 The Opium War, Compilation Group for the history of modern China, The Minerva group, Honolulu, University Press for the Pacific 2000; Lowell, Julia, *Opium Wars, Drugs, dreams and making of China*, London: Pan Macmillan Publ. 2012.

«minimum» in the death penalty process. The first and foremost safeguard is the prohibition of the death penalty for crimes that do not meet the characteristics of the «most serious crimes».

The question that summons us here today is precisely whether drugs trafficking can be considered by the international community as one of the most serious crimes and whether the death penalty for perpetrators of these crimes is therefore legitimate in international law.

THE DEATH PENALTY IN OUR TIME AND THE MILLENNIUM DECLARATION

However, before proceeding and in order to define the scope of this legitimacy, we should remember another big change that has taken place since 1948, of enormous significance for our topic.

The issue of human rights has gone from being a question of the rights of man against the State, to a question of world governance: the obligation of States to the international community. Changes in the perception of human rights as a matter of international governance, have only gradually occurred. The final decision was adopted by the United Nations General Assembly in December, 2000, in the form of the Millennium Declaration.

The Declaration proclaims the principles of new global governance, the text of which represents a proclamation of human rights and their progress. It is a real call to fight against violent crime that wisely incorporates, as one of the Millennium Goals, the fight against hunger and death by famine (starvation); the fight against death from curable diseases, against the most serious discrimination of women, etc.⁷ In short, the Millennium Declaration is a statement against criminal violence that kills and the violence of thousands or millions of people and whole countries that, until present date, the world has left to die.

This general spirit of the progress of political and social rights is truly the new international «context» of ideas and should be taken into account by everybody when interpreting the treaties, as stated in article 31.1, in relation to article 38 of the Vienna Convention on the Law of Treaties of 1969. In any case, what the Declaration represents is a decision by the international community to make progress on human, political and social rights in laws and in real life. And all of this should have consequences for progress towards the abolition of the death sentence and, if applicable, the moratorium. The resolution of the General Assembly in favour of the moratorium, in 2007, is an expression of that new context. All international human rights law should, in view of the impetus of the Millennium Declaration, be

7 A/C.3/62/L.29, 1 November 2007.

interpreted by all the organs of the United Nations system, in the strictest and most favourable way for the consolidation and progress of each of the fundamental laws. As regards our topic here, the Millennium Declaration directly implies stricter and more restrictive control over the States. It supports the most favourable interpretation, in terms of individual rights, of all those limitations that are related to the safeguards in criminal proceedings that contemplate the death sentence.

Reasonably, retentionist countries should be aware that the question of safeguards that impose the limits on the death penalty can no longer be seen as something alien to human rights, as a mere aspect of criminal law of each country's sovereignty, but as a matter of international law, that is mandatory and binding.

Apart from the legal intricacies of the above, the retentionist countries should ponder the question of safeguards; the issue of the moratorium adopted by the General Assembly, in 2007, deserves to be understood by everybody as a rallying point for the international community, as a step towards the reduction of violence in the world, with policies that are contrary to letting hundreds of thousands of people die from hunger, disease and discrimination.

On the other hand, the intelligence of the rulers and intellectuals of the retentionist countries should recognize that the idea of the renunciation of the death penalty today already belongs to that select group of big ideas of the United Nations that are going to change the world and that have the strength to do so inexorably over time, as Jolly, Emmerij and Weiss have expressed so brilliantly.⁸

- The idea that development should be human development and not only economic growth.
- The idea that the environment must be respected and its incessant destruction stopped and that development must conserve the life of the planet for future generations.
- The idea that half of humanity, women, cannot be excluded from Government and civil life and that the elimination of gender discrimination and the empowerment of women is essential.
- The idea of the end of impunity for crimes of war and against humanity and international justice.
- The idea that „responsibility to protect« implies the legitimate intervention of the United Nations in countries, which oppose the idea of non-interference.

8 JOLLY, J./EMMERIJ, L./WEISS, T.G.: *The Power of UN Ideas: Lessons from the First 60 Years. A Summary of the Books and Findings from the United Nations Intellectual History Project*, New York 2005. On line: <http://www.unhistory.org/PowerofUNTOC.pdf>

Following the Resolution of the General Assembly of 2007 and the preparatory acts since 1948, it appears evident that the abolition of the death sentence is another one of these grand ideas that inspire the future and world governance.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE SAFEGUARDS OF THOSE PROCESSED FOR CAPITAL OFFENCES: THE QUESTION OF «THE MOST SERIOUS OFFENCES»

In 1966, article 6(2) of the Covenant of civil and political rights established that: «In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes...» However, the cases presented before various international institutions, the legitimacy of which has been debated from the point of view of whether they form part of the «most serious crimes», are of very different kinds: crimes against sexual morals, from adultery to homosexual relations, corruption, economic crimes, crimes related to drugs trafficking, political offences and of opinion and treason, terrorism, and crimes against religion.

The problem resides in that numerous countries act with the idea that «the most serious crimes» are something that each country can decide in accordance with their own political, moral and religious criteria. The question of what type of offences can meet the requirement in the Convention has been dealt with by scholars in international law such as Roger Hood and William Schabas⁹, as well as by the most relevant international human rights bodies and authorities.

The reports of the special rapporteurs on extrajudicial, summary or arbitrary executions provide full information on the resolutions of international organs: Philip Alston A/HRC/4/20, 29 January 2007; Manfred Nowak A/HRC/10/44, 14 January, 2009; the report on the question of the death penalty of the Secretary General of 2012 (A/HRC/21/29, 2 of July 2012 and the provisional report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment, Juan E. Méndez. A/67/279, 9 August, 2012. Recently, the International Commission against the death penalty has published an excellent summary under the title «The death penalty and the most serious crimes. A country-by-country overview of the death penalty in law and practice in retentionist states»,

Let me summarise what has been said through the presentation of some of the various conclusions at which, between us all, we have arrived:

In the first place, since article 6 of the Covenant was drafted in 1966, as has been pointed out, it is evident that the concept of «the most serious crimes» would need

⁹ HOOD, R.: *The Death Penalty. A World-wide perspective*, 4th Edition. Oxford. 2008, p. 21-22, 130-132; SCHABAS, W.: *The abolition of the death penalty in International Law*, 3rd Ed., Cambridge. 2002.

a dynamic interpretation, in an increasingly narrower sense. The first attempt took place in 1984, when the United Nations Economic and Social Council adopted the resolution on safeguards guaranteeing the protection of the rights of those facing the death penalty. The Council proposed that the clause should be understood in the sense that the legitimization would not cover more than the international crimes with lethal results or with extremely serious consequences. Although the definition of what could be understood in each cultural or political arena by most serious crimes was variable, it was thought that the references to death as intentional or to lethal results, or other extremely serious consequences would be an indicator for the future that such offences would have to be understood as only those that entail loss of life or serious danger thereof. Nevertheless, the Human Rights Committee, in its proceedings, waived aside such descriptions, considering that it would be enough to understand that the precept would have to be read restrictively. This would mean that the death penalty could only appear as an absolutely exceptional measure. The Inter-American Convention on Human Rights has proclaimed as much in art. 4 (4)¹⁰ And the Human Rights Commission has rejected a broad list of crimes as crimes that are not sufficiently serious for the purposes of the Covenant, such as financial crimes, desertion, assisted suicide, drugs-related offences, apostasy, homosexual relations between adults, illicit sex, corruption, armed robbery that involves no deaths¹¹ After all that, Roger Hood proposed that article 6 of the Covenant and Safeguard n° 1 should read as follows: «In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious offences of culpable homicide (murder), but it may not be mandatory for such crimes»¹²

Recently the International Commission against the death penalty has produced a very good summary of the issue and detailed information on the retentionist countries under the title «The death penalty and the most serious crimes» – A country by country overview of the death penalty in law and practice in the retentionist States»¹³.

The successive reports of the Secretary-General have gradually clarified the meaning of the previous expression «most serious crimes»: in that it should deal with offences that constitute «a threat to life», in the sense that death would be a very likely consequence of the action. For this reason, we should understand that its

10 GARCÍA RAMÍREZ, S., La Corte Interamericana de Derechos Humanos ante la Pena de Muerte. In *Hacia la abolición universal de la pena de muerte*, Tirant lo Blanch, Valencia, 2010.

11 Vid. HOOD, R.: op. cit. p 131.

12 HOOD, R.: cit., p. 132

13 http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes_final_6Feb2013.pdf.

scope cannot extend to anything more than intentional crimes with deadly (lethal) consequences or other extremely serious consequences.

The Human Rights Committee «...is of the opinion that the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure». And in the last report of the Secretary General of 2012 (A/HRC/21/29), par. 24, speaks directly about the most serious crimes: «that is, intentional crimes with lethal or other extremely grave consequences».

The Human Rights Committee, for its part, has stated that the expression «the most serious crimes» should be interpreted in a restrictive way, in the sense that the death penalty should constitute an absolutely exceptional measure. Indeed, the Committee found no problems with the cases in which the crime under review was murder. Moreover, it has consistently rejected the imposition of the death penalty for the consequences of crimes that do not involve the loss of life. As the Special Rapporteur Philip Alston says about the committee and the commission: «... Indeed, the Committee and the Commission have rejected nearly every imaginable category of offence other than murder as falling outside the ambit of the most serious crimes.»¹⁴

Finally, the conclusion, in 2007, of the rapporteur general Philip Alston must be noted: under international law the death penalty can be applied only for the most serious crimes. This standard, as well as all the other rules of international law concerning human rights, cannot be interpreted in a subjective way by each country without making a mockery of the basic principle. Over the last decade, from a variety of sources, international jurisprudence has managed to clarify the question of which crimes can be legitimately classified as the most serious. Accordingly, the death penalty can only be imposed where there was an intention to kill which resulted in the loss of life.¹⁵

THE DEATH PENALTY IN DRUG-RELATED OFFENCES

Drugs trafficking is behaviour that was first punished with the death sentence in the 1950s, when the expansion of consumption began. It has unleashed a social and politico-criminal reaction even in countries that do not have the death penalty for such crimes, among which Egypt and Malaysia.

In Egypt, the first reaction against drug consumption of the Free Officers Movement and Gamal Nasser that led the 1952 revolution was to raise the punishment from three years imprisonment for traffickers to life imprisonment with hard labour.

14 ALSTON, P.: A/HRC/4/20, January 29, 2007, 52 par.

15 The rapporteur has reiterated this conclusion in the Report of 2009, an addendum to the mission to the USA (May 28, 2009).

The failure of this punishment to contain the consumption and the traffic of drugs led the Egyptian governments to introduce the death penalty and, in 1985, to call for its application by the Prosecutor General, faced with the refusal of the judges to apply it. Malaysia followed a similar path in the 1970s, when the law on drugs was modified to incorporate the death penalty as a facultative punishment. As the measure did nothing to contain the traffic and consumption of drugs, it became a single mandatory punishment in 1983, not that the problem improved afterwards. In China, the death penalty for drugs crimes was only introduced in 1982.

The three countries appear to have fallen into the politico-criminal error that the North-American Egyptian criminologist, E. A. Fattah has criticized: the idea that the severity of the punishment is relevant to produce a degree of deterrence to criminal behaviour in a sort of mathematical equation, that is in all senses shown to be false. He even warns that in some countries the legitimacy of the death penalty is defended for drugs trafficking offences, out of a surprising religious fundamentalism, as if the fundamentals of any religion envisaged the punishment of drugs trafficking by death.¹⁶

Today there are 32 countries that enforce the death penalty for drugs-related crimes, according to the report of the *International Commission against the death penalty*, which are¹⁷: Bahrain, Bangladesh, China, Cuba, Egypt, Guyana, Korean People's Republic, India, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Malaysia, Pakistan, Palestinian National Authority, Qatar, Saudi Arabia, Singapore, South Sudan, Sudan, Thailand, Uganda, United Arab Emirates, United States, Vietnam, Yemen, Taiwan.

The situation of death penalty provisions for crimes relating to drug-trafficking is summarised in the Report to the Secretary General of the United Nations A/HRC/21/29 of 2 July 2012, in the following way, in paragraph 25: «Harm Reduction International reported that there are currently 32 States or territories that prescribe the death penalty for drug-related offences. It further reported that hundreds of people are known to have been executed for drug-related offences, in 2011 and early 2012. In the Islamic Republic of Iran, a new anti-narcotics law came into force in 2011, which expands the application of the death penalty to new drug-related offences, even by increasing the range of prohibited substances. In a press statement on 22 September 2011, a number of special rapporteurs of the Human Rights Council condemned the continuing execution of persons charged

16 See, on these experiences from Egypt and Malaysia, the reflections of FATTAH, E.A.: The use of the Death Penalty for drug offences and for economic crimes. A discussion and a critique, especially pp. 725-729, in *Revue Internationale de Droit Penal*, Editions Erès, N° 58, 1987.

17 The death penalty and the «most serious crimes», International Commission against Death Penalty, January 2013.

with drug-related offences, stressing that these do not amount to the most serious crimes for which the death penalty may be applied under international law. The Special Rapporteur on the situation of human rights in the Islamic Republic of Iran reported that there were 670 executions in Iran, in 2011, of which 81 per cent were of drug offenders, including people believed to be children under 18 at the time the offence was committed (A/HRC/19/66, par. 20–21). A total of 51 alleged drug offenders were executed in the first six weeks of 2012. There are around 4,000 Afghan refugees on death row for drug-related offences in the Islamic Republic of Iran. In Indonesia, 50 of 87 individuals on death row have been convicted of drug-related offences, although no execution has been carried out since 2008. Singapore has reportedly executed 326 drug offenders since 1991, including two that were executed in 2011. An unknown number of people have been put to death in China and the Democratic People's Republic of Korea for drug-related offences, and at least 27 people were sentenced to death in 2011 in Vietnam for smuggling drugs. Nine death sentences for drugs-related offences were handed down in Thailand, in 2011, and as of early 2012 there were at least 245 people on death row for drug offences there. In this regard, a reported amendment to the Narcotics Act of Vietnam, which would shorten appeals times and expedite executions, is of significant concern because of the number of people on death row and the drug offenders among them.»

Manfred Nowak, Special Rapporteur on torture and other cruel, inhuman or degrading treatments, in his Report of 14 January 2009 (A/HRC/10/44, paragraph 66) expressed his concern over the possibility of a death sentence for drugs in some countries and stated, after mentioning the coinciding opinion of the Committee of Human Rights and of other Special Rapporteurs, that «drug offences do not meet the threshold of most serious crimes. Therefore, the imposition of the death penalty on drug offenders amounts to a violation of the right to life».

The systematic negation of the legitimacy of administering the death penalty for drugs related crimes agrees with the general points outlined above, which limit the most serious crimes to intentional homicide. It may be seen in the most recent pronouncements of the actual Special Rapporteur on torture, Juan E. Méndez: «with respect to countries that impose the death penalty for drugs-related crimes, it constitutes a violation of article 6.2 of the Covenant»¹⁸.

The High Commissioner for Human Rights, Navi Pillay, declared in July, 2012, that in accordance with article 6 of the Covenant, the application of the death penalty must limit itself to the most serious crimes and «it should be repeated that those

18 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/19/61. 18 January 2012.

terms will be interpreted in the sense that the death penalty may only be applied for the crimes of murder». And she continued by affirming that the use of the death penalty for crimes related to drugs or for crimes committed in connection with international organized crime is prohibited if the crimes in question do not involve the destruction of human lives¹⁹.

Finally, the Secretary General of the United Nations, in the same aforementioned circumstances and at the same time, announced that he would set down his own particular opinion in the report that he would present in 2012, because 32 countries retain the death penalty for drugs-trafficking crimes, which are crimes that do not comply with the requirements of the most serious crimes and he announced that the violation of this norm of international law will affect international cooperation with other countries. The Secretary General has reiterated what has been presented in the Declaration on the occasion of the meeting between the ICDP and the High Commissioner for Human Rights in Geneva, 25 February, 2013: «The death penalty is still used for a wide range of crimes, such as drugs crimes, which do not meet the threshold of «most serious crimes»²⁰.

Those countries therefore incur a serious violation of International Law and should be an object of constant criticism, at the same time as promoting the universal moratorium.

19 Statement of High Commissioner for Human Rights Navi Pillay at the OHCHR-Global Panel on «Moving away from the Death Penalty – Lessons from national experiences», 3 July 2012, New York

20 www.un.org/sg/statements, 25 February 2013.

PUBLIC OPINION AND PUNISHMENT IN JAPAN

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INTRODUCTION

The number of criminal cases in Japan has been decreasing since 2003¹ and although the crime rate is essentially lower than in other countries,² public opinion continues to call for harsher treatment of criminals. While the number of homicide cases remains constant,³ public support for capital punishment has been gaining ground since 1975.

Since around 2000, there has been a series of larger reforms within the criminal justice system in Japan, triggered mainly by victims' movement, which attracted a ground-swell of public opinion. This is particularly evident in such areas as «lay

Takayama, K. (2014), Public Opinion and Punishment in Japan. In Arroyo, L., Schabas, W., Takayama, K., & Muñoz, M. (cords.). *Death Penalty: A Cruel and Inhuman Punishment* (pp. 59-69). Cuenca: Ediciones de la Universidad de Castilla-La Mancha.

1 Ministry of Justice, White Paper on Crime 2010:

http://hakusyo1.moj.go.jp/en/59/nfm/n_59_2_1_1_1_1.html

<http://hakusyo1.moj.go.jp/en/59/image/image/h001001001001e.jpg>

2 Ministry of Justice, White Paper on Crime 2010 Table 1-4-1-1:

http://hakusyo1.moj.go.jp/en/59/nfm/n_59_2_1_4_1_0.html

3 Ministry of Justice, White Paper on Crime 2010, Appendix 1-8:

http://hakusyo1.moj.go.jp/en/59/nfm/n_59_3_1_8_0_0.html

In the table, Japan's is approximately at the same level as the U.K., the population of which is about half the size of Japan's.

participation in the trial», «enhancement of the victim's rights in the criminal procedure», «juvenile law», and «penalties and sentencing.»

In what follows, recent reforms in this punitive direction, such as «populist legislation», will be briefly introduced and analyzed, to conclude that they have been strongly influenced by the public opinion. However, public opinion has little or no scientific basis and is based more on lobbying from victims' movements and exposure in the mass media. The Japanese are surprisingly unaware of international criticism directed at the present situation of human rights safeguards and of capital punishment and of worldwide tendencies toward its abolition. This is even more regrettable, as the preamble of the Constitution reads that the Japanese people «desire to occupy an honoured place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the Earth.»⁴ Where have we lost our honoured place?

In the Japanese criminal justice system, the public prosecutor has the greatest power to institute criminal proceedings. Once a prosecutor always a prosecutor of the Public Prosecutor's Office; a status that is practically guaranteed until retirement. Prior to the concerted lobbying of victims' movements and in accordance with the discretionary prosecution system, prosecutors could freely decide whether they wished to indict a suspect. They issued indictments only in the cases where they had a shortage of hard evidence, which often had conviction rates of 99.9% or higher and considerable delays until the final judgment. Professional judges had to examine abundant forms of evidence and the opinion (or reasoning) that upheld the judgment was often too lengthy and even incomprehensive. At the same time, crime victims and their families did not have a right to be present at the trial and were treated as mere witnesses. Their discontent festered, especially in cases of acquittal or mitigated sentences.

By 2000, however, a vociferous set of victims' movements had consolidated their presence and the mass media supported their claims for harsher punishments, even in cases involving negligence and juvenile⁵ offenders. Some victims' families insisted on their «right to retribution» in the mass media and won a degree of public approval. In 2000, a non-profit organization called the «National Association of Crime Victims and Surviving Families» (NAVS) was established and went on to become one of the most influential pressure groups in Japan. The maintenance of capital punishment figured among its greatest concerns. The association repeatedly issues calls for stricter punishment and the «right to retribution.»

4 For the original English version of the Constitution, see the website of the Prime Minister and the cabinet: http://www.kantei.go.jp/foreign/constitution_and_government/frame_01.html

5 In Japan, juvenile offenders are nineteen years old or younger.

«POPULAR BASE» OF THE JUSTICE SYSTEM

Public distrust in the justice system drove the Government to establish the «Justice System Reform Council» in 1999. In its final report, issued in 2001,⁶ it recommended the introduction of «lay members» on the judicial panel of the courts of first instance for serious criminal cases, in order to reflect «sound social common sense» both in fact finding and in sentencing. This proposal for the «establishment of the popular base of the justice system» was then enacted in the Lay Assessor Act (Law No. 63 in 2004).⁷

Trials with the new system of lay judges began, in 2009, for serious cases including all offenses punishable by capital punishment and life imprisonment.⁸ The court is composed of three professional judges and six citizens acting as assessor judges. Contrary to many European court systems, these lay judges only sit on one single case. The prosecutor can appeal to the high court against acquittal by the district court.

According to the report of the Supreme Court in 2012, sentencing became harsher after the introduction of the new system in cases of murder and sexual offenses.⁹ Some scholars have pointed to a certain imbalance in sentencing between similar cases. Others have expressed anxiety over mental pressure on civil participants in capital cases. However, since the system was instituted in August 2009 up until the end of June 2013, there had been twenty death sentences one of which included a juvenile case.

Certainly, lay participation in fact finding, if the system worked properly, could bring with it positive effects, for example, for the avoidance of miscarriages of justice. However, as the Japanese sentencing system combines concepts of retribution and prevention in a complicated and unwritten way, citizens, sitting for only one case, usually do not understand the structure of sentencing and are often left at a loss. Discrepancy in sentencing between similar cases may also be a reason for dissatisfaction from the point of view of the accused.

Another, earlier system of lay participation in criminal procedure is the Committee for the Inquest of Prosecution. It consists of eleven citizens selected at random

6 Recommendations of the Justice System Reform Council (2001), Chapter IV:

http://www.kantei.go.jp/foreign/policy/sihou/singikai/index_e.html

7 About details, see Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, *East Asia Law Review*, Vol. 4 No. 1 (2009), p. 125, also available online.

8 The Supreme Court gives a brief description of the present Japanese legal system:

http://www.courts.go.jp/english/judicial_sys/index.html

9 The Supreme Court, *Saibanin-saiban no jisshijokyo ni suite* (On Practice of the Mixed Courts) (available only in Japanese), Annex 4:

http://www.courts.go.jp/saikosai/iinkai/saibanin_kondan/siryo_17/

and is authorized to review the decisions of the prosecutor not to indict. Formerly, it only had one advisory power but, since 2009, it has had authority for «compulsory prosecution».¹⁰ This reform of the Act on the Committee for the Inquest of Prosecution was a further result of pressure from victims' families.

THE VICTIM'S RIGHT TO RETRIBUTION?

Victims' movements lobbied successfully for several changes in the Criminal Procedure Code and the Juvenile Act.

In 2000, the Criminal Procedure Code was amended to give victims or their surviving families the right to make a statement at the trial about their feelings and their opinion on what the sentence might be (Article 292-2).¹¹ Although this statement «may not be used as evidence for fact finding of the crime» (Paragraph 9), it is considered that the statement may influence the sentence in some way. Originally, it was intended as a similar system to the «victim impact statement» in the United States. In practice, however, there are many cases in which the statements of the surviving families simply insist on the application of the death penalty, rather than describing their own suffering.¹²

Later on, in 2007, the Code was changed to introduce a «victim participation system» in cases of certain serious crimes (Articles 316-33 to 316-39). It has been in effect since 2008 and permits victims and their bereaved families to question the defendant and witnesses.¹³ In fact, in Japan, there is no system of «private prosecution» in criminal matters and victims are in no way equal in status to the prosecutor. However, calls from the victims' movements for changes in the victim's status before the court strongly influenced the new system. Many scholars have questioned and criticized the legal nature of this new system. According to the Ministry of Justice, taking victims' opinions into consideration during criminal procedure would strengthen people's trust in the criminal justice system.

Victims' movements have also targeted juvenile law. Formerly, proceedings under the Juvenile Act were of a different character from that of standard criminal

10 UNAFEI (the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders), *Criminal Justice in Japan*, p. 23.

http://www.unafei.or.jp/english/pdf/CJSJ_2011/06Chapter4.pdf

11 An English translation of the Code is available at:

http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=02&id=2056

12 For current legal measures for victims and their families explained by the Ministry of Justice, For Victims of Crime, see: <http://www.moj.go.jp/ENGLISH/CRAB/crab-02.html> and by the National Police Agency, Police Support for Crime Victims, see:

<http://www.npa.go.jp/english/kyuuyo1/Police%20Support%20for%20Crime%20Victims.pdf>

13 A brief explanation by the White Paper on Crime, Part V, Chapter 2 is available at:

http://hokusyo1.moj.go.jp/en/59/nfm/n_59_2_5_2_1_2.html

procedure. Juvenile cases were handled by the family court and the main purpose of the act was education and rehabilitation of the juvenile delinquents. The usual criminal procedure was only possible in exceptionally serious cases involving juvenile offenders aged sixteen or older. However, although juvenile delinquency showed a strong decline even in terms of the juvenile population,¹⁴ the Juvenile Offenders Act was amended in 2000, 2007 and 2008 in an increasingly punitive way,¹⁵ mirroring the opinions held by victims. Serious cases should in principle follow the normal criminal procedure of the district courts, however one consequence of these reforms was a death sentence handed down in a juvenile case by a district court with civil participation, in 2010. Even the defence counsel now has a role in the juvenile procedure of family courts as well as the prosecutor, with the victim's participation. Minors under fourteen years old can be also held in educational custody, should they have «committed» serious crimes¹⁶.

The Japan Federation of Bar Associations¹⁷ has published opinions and statements against these amendments, in defence of legal safeguards for the rights of juvenile offenders. However, the victims' movements appear to wield more influence. In January 2013, the Legislative Council of the Ministry of Justice decided to make a recommendation to raise the maximum juvenile penalty to twenty years and to strengthen the power of the prosecutor in juvenile proceedings.

ZEST FOR MORE PUNISHMENT

The lobby of crime victims and their surviving families has been so influential that it has prompted changes to legislation. Moreover, the mass media has often focused attention on their opinions, swelling public support, which in turn moves politicians to change the law. Several examples of such changes can also be observed in substantive criminal law.

At the first stage of the massive victims' movements, a petition was prepared by a family who had lost two children in a traffic accident in 1999. At the time, offenses that involved negligence were not as strictly punished as offenses involving *mens rea*. Nevertheless, the victims' parents collected 370 thousand signatures to amend criminal law, in order to stiffen the penalty for traffic offenses. It resulted in the introduction of a new offense of «dangerous driving causing death or injury»

14 Ministry of Justice, White Paper on Crime, 2010, Chapter IV:

http://hakusyo1.moj.go.jp/en/59/nfm/n_59_2_4_1_1_1.html

15 As to discussion on reform, see National Police Academy of Japan, Current Juvenile Police Policy in Japan, 2006: <http://www.npa.go.jp/english/seisaku3/20060424.pdf>

16 For an English translation of the act is available in its version on March 31, 2010:

http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=1978

17 <http://www.nichibenren.or.jp/en.html>

in the Penal Code, in 2001. This success, led to an escalation in the lobbying of victims' associations. Through several amendments by 2007, the maximum penalty for causing death while driving under the influence of alcohol had risen (from seven before 2001) to twenty-five years imprisonment and some courts have recently imposed sentences of over twenty years imprisonment. But the bereaved families of traffic offenses who did not successfully «win» such punishment were not satisfied and called for yet further legislation. In March 2013, the Legislative Council of the Ministry of Justice submitted a report to the minister, which recommended enlarging the scope of severe traffic offenses, in response to pressure from victims' movements nationwide.

Obviously, such legislation seriously imbalanced the penalties for a variety of other offenses and led to doubts over the nature of appropriate punishment. For example, the penalty was only increased for road traffic accidents, as it was only the families of the victims of such accidents that actively lobbied for greater retribution. The penalties of up to five years imprisonment for all other accidents involving airplanes, ships, trains and so on remained unchanged, even though they usually claimed larger numbers of victims. The families of victims of train accidents have more recently organized a group to lobby the Committee for the Inquest of Prosecution. They not only called for the indictment of the ex-president of the train company, but the ex-ex-president and the ex-ex-ex-president as well. The Committee has been willing to listen to their demands, although proceedings are still ongoing. What appears even more irrational is the contrast with most cases of intentional homicide, which are punishable by up to fifteen and no more than twenty years imprisonment.

The victims' movements not only targeted road traffic offenses. The amendment of the Penal Code of 2004 significantly raised the penalties for certain sex crimes and offenses resulting in death or injury. At the same time, the statute of limitation for such crimes was also extended and was changed again in 2010. These amendments were not grounded in scientific doctrine on criminal policy, but were merely the consequence of pressure from victims' movements coupled with public opinion¹⁸.

PUBLIC OPINION AND THE MASS MEDIA

Such large-scale support for victims' movement among the public has mostly been a result of information from the mass media. In Japan, the mass media broad-

18 Ambiguous references to these circumstances are given in the explanatory notes of the Ministry of Justice, which contain such phrases as «in view of social situation etc.» and «taking recent circumstances etc. into consideration».

cast the names of both crime offenders and victims¹⁹. Detailed reports are quite common on their private lives on the TV and in magazines. Usually very sympathetic towards the victims, those reports create great interest and influence public opinion.

The Japanese tend to believe mass media reports all too easily, even when their contents are erroneous. For example, Mr. *Yoshiyuki Kono*, a victim of the Sarin gas attack on the Tokyo underground perpetrated by the *Aum Shinrikyo* sect in 1995, was at first named as one of the cult members in the mass media, and horrendously slandered with serious consequences for his private life²⁰. In any case, the mass media has found it easy to attract public attention by spotlighting the victims' feelings.

In a murder case, in which a juvenile killed a woman and her baby in 1999 (*Hikari-shi* case), the husband, the father of the baby, continuously appeared on television to insist on the death penalty for the offender. The case law of the Supreme Court had in fact limited the scope of capital punishment for juveniles to extremely severe cases in 1983 (*Nagayama* case)²¹. In subsequent murder cases involving two victims and a juvenile offender, capital punishment was not imposed. Nevertheless, the Supreme Court deftly changed its tune by approving the death sentence²². Some scholars criticized both its conclusion and the way the court had disregarded earlier case law. Others suggested that it had been greatly influenced by public opinion, stirred up by the mass media. The Federation of Bar Associations strongly opposed the judgment²³. A non-profit organization, the Broadcasting Ethics and Program Improvement Organization (BPO),²⁴ had published its opinion on the case in 2008, expressing serious

19 One exception is juvenile cases. Article 61 of the Juvenile Act states that: «No newspaper or other publication may carry any article or photograph from which a person subject to a hearing and decision of a family court, or against whom public prosecution has been instituted for a crime committed while a Juvenile, could be identified based on name, age, occupation, residence, appearance, etc.» However, there are no legal sanctions against its violation. Mass media by now voluntarily refrain from revealing names of juvenile and insane offenders.

20 See New York Times, «In Japan Gas Attack, He's The Wrong Man,» June 2, 1995.

<http://www.nytimes.com/1995/06/02/world/in-japan-gas-attack-he-s-the-wrong-man>

21 Judgment of the Supreme Court on July 8, 1983, Keishu (Supreme Court Reporter for Criminal Matters) vol. 37, No. 6, pp. 609 ff. <http://www.courts.go.jp/english/judgments/text/1983.7.8-1981-A-No.1505.html> The accused had intentionally killed four people and was sentenced to death, but the judgment concluded that the circumstances were still on the borderline between capital punishment and life imprisonment.

22 Judgment of the Supreme Court on February 20, 2012, Saibanshu keiji (Internal collection of the Supreme Court judgments and decisions in criminal matters) No. 289, pp. 383 ff.

23 For further details of the case, see Japan Federation of Bar Associations, «Statement on a Death Sentence Handed Down to a Juvenile.» http://www.nichibenren.or.jp/en/document/statements/year/2012/120220_2.html

24 <http://www.bpo.gr.jp/?p=2808> (in Japanese)

concerns that the mass media were falsely representing the facts and the structure of the criminal justice system, making the defence lawyers appear hideous²⁵.

Polls have sometimes revealed how public opinion often resorts to scientifically erroneous facts. In the most recent survey of public opinion on capital punishment conducted by the Cabinet Office in 2009,²⁶ there were only two alternatives for the first statement, namely, «Capital punishment must definitely be abolished in all cases» and «Capital punishment must be tolerated in some cases.»²⁷ The former statement was supported by 5.7% and the latter by 85.6%. Among the supporters of the death penalty, 54.1% agreed with the opinion «If the death penalty were abolished, victims or their families would be dissatisfied,» 53.2% with «Serious crimes must be punished by capital punishment,» and 51.5% with «Serious crimes will increase if the death penalty is abolished.» The first two of these statements present a naïve idea of retribution and the last one quite obviously reveals a degree of ignorance over the effectiveness of the death penalty as a deterrent, which has never been scientifically proven. The mass media in Japan does not report the world tendency towards abolition of the death penalty²⁸ at all and the public is generally unaware that abolition has not led to an increase of serious crimes worldwide and that its neighbour, South Korea, has not executed any further death sentences since 1997.²⁹ According to Amnesty International, there were only 21 countries that executed the death sentence in 2012,³⁰ but the Japanese public are all too often unaware that that their country forms part of this absolute minority³¹.

25 The BPO's Decision No. 4 on April 15, 2008 (available only in Japanese): http://www.bpo.gr.jp/?page_id=1092

26 As to the result, see TAKAYAMA, K./YAMAMOTO, M.V.: «The Death Penalty in Japan», in ARROYO, L./BIGLINO CAMPOS, P./SCHABAS, W. (eds.): *Towards Universal Abolition of the Death Penalty*, 2010, pp. 291-307.

27 Usually, there are four or five alternative answers for one question. It is said that the Liberal Democratic government that organized this poll selected the responses so that its supporters would form the majority.

28 On the recent situation in the United Nations, see SCHABAS, W.A.: «The United Nations and Abolition of the Death Penalty», in YORKE, J. (ed.): *Against the Death Penalty*, 2008, pp. 25 ff.

29 It has been pointed out that public opinion in South Korea does not strongly support abolition. See BAE, S.: «The Abolitionist Movement in Death Penalty-Friendly Asia», in YORKE, J. (ed.) (Fn. 27), p. 232. In 2008, the United Nations Human Rights Committee recommended that Japan stop using public opinion as an excuse for not contemplating the abolition of capital punishment.

30 Amnesty International, *Death Sentences and Executions in 2012*: <http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2012>

31 The Parliamentary Assembly of the Council of Europe decided in 2001 that the Council would end the observer status of the United States and Japan, if they made no further efforts to work towards abolition of capital punishment, a situation which is again largely ignored by the public.

A further example of this lack of knowledge is the result of a survey by the Legal Training and Research Institute³² in 2007. It conducted a poll, in 2005, of 1000 citizens and all district and high court criminal judges. To the question «Should the penalty be heavier if the offender in the same case is a juvenile rather than an adult offender?» 25.4% of respondents answered «Yes», although none of the judges concurred with this opinion³³. The poll responses would suggest that one fourth of the general public had no understanding whatsoever of the Juvenile Act.

CONCLUSIONS

In general, Japanese citizens are highly educated and well disciplined. Attitudes that are evident in their reaction to the sequels of the tsunami at Fukushima, in March 2011, and in the proper functioning of the lay participation in the criminal court that was recently introduced, in 2009. Nevertheless, the Japanese still cling to a very naïve belief in moral retribution and in the deterrent effect of capital punishment.

Insofar as the mass media pursue their interests, it is not their attitudes, but rather the victims' desire for retribution that will first have to change. In Japan, two factors seem to play an important role for such a distorted «right» of the victims to 'revenge' the deaths of their relatives.

One factor is the inadequacy of the State's support for crime victims. By now, several new legal instruments have been introduced, in order to improve victims' rights. However, mental care, protection of privacy, compensation and continual public support are lacking. Under these circumstances, it is hardly surprising that the victims and their bereaved families consider nothing other than harsh punishment of the offender. The amendments of the Criminal Procedure Code since 2000 are said to have contributed to the victims' «catharsis», but it should not be pursued through sacrificing the rights of the accused.

The other factor is that the bereaved families blame themselves in their thoughts. For example, the parents who collected 370 thousand signatures had lost their two children before their very eyes in the accident, in 1999, but they themselves had survived. They must to some extent have blamed themselves for not having been able to rescue their own children. Again, the husband of the victim in *Hikari-shi* case was unable to protect his wife and baby because he was absent for whatever reason. The founder of the «National Association of Crime Victims and Surviving Families,» an attorney-at-law, lost his wife because his business enemy killed her while he was

32 http://www.courts.go.jp/english/institute_01/index.html

33 Report of the Legal Training and Research Institute of Japan, Vol. 57 No. 1, 2007, p. 15 (available only in Japanese).

absent. Consciously or unconsciously, they are defending themselves by attacking the offender. In reality, nobody in society would blame them because they had not done enough to protect their families. Had they become aware that there was no need to shoulder the blame and remorse themselves, they might perhaps not feel the need to insist on the ultimate penalty for those responsible for such tragic events.

While the mass media are often more interested in arousing public curiosity than in conveying a wide range of information to the public, the enlightenment of the public must be accomplished through efforts from within and outside the State. International networks are particularly important if there is to be a breakthrough. The public should be informed that the member states of the EU and the Council of Europe have abolished the death penalty and that more and more American states are travelling down the same road. There are also more abolitionist countries in Asia, which not only include countries with a Buddhist tradition but also those with an Islamic culture.³⁴ Even in China, where the number of executions is supposedly very high, the people do not support the death penalty as much as they do in Japan³⁵ and the State itself is making efforts to reduce the scope of this punishment³⁶.

It is important that the public become aware not only of the world tendency but also of disadvantages of retaining capital punishment. In Japan, there have been several cases of murder or attempted murder, in which the offenders actively desired the death penalty. Their aim was to attract social attention. In such cases, capital punishment has no deterrent effect whatsoever and can even promote more serious forms of crime. A further negative aspect of capital punishment is that Japan cannot have offenders extradited from the majority of abolitionist countries. Such a case actually occurred between Japan and Sweden. Japan would practically lose its jurisdiction for the most severe offenses when the offender is abroad, which would hardly be in the public interest.

In view of the educational level of the Japanese, there seems to be some possibilities that their present attitude will change in the future, if they are better informed. Traditionally, they have always shown a certain degree of adaptability. In the 1975

34 According to BASSIOUNI, M.C.: «La Muerte como Castigo en la Sharia», in ARROYO ZAPATERO, L. et al. (eds.): *Hacia la Abolición Universal de la Pena Capital*, 2010, pp. 387 ff., it is permitted for Islamic countries to limit capital punishment to very extreme cases.

35 According to a survey conducted from 2007 to 2008, only 57.8% of the Chinese were in favour of capital punishment. 59.6% were afraid of misjudgement and 58.9% were against arbitrary practice. See OBERWITTLER, D./QI, S.: *Public Opinion on the Death Penalty in China*, p. 10, p. 18: http://www.iuscrim.mpg.de/shared/data/pdf/forschung_aktuell_41.pdf

36 MACBEAN, N.: «The Death Penalty in China», in YORKE, J. (ed.) (Fn. 27), pp. 205 ff., DONGPING, Z.: «The Establishment and Improvement of Laws on Capital Punishment in Modern China», in TOMIYA, I. (ed.): *Capital Punishment in East Asia*, 2012, pp. 315 ff.

poll, only 56.9% of those surveyed expressed their support for capital punishment.³⁷ Even today, more abolitionists, 9.4%, are found among the younger generations than among the elderly Japanese. The Supreme Court reported that the lay participation system brought essentially more judgments with probation than before, which indicates, according to the Supreme Court, that citizens are showing a strong interest in the rehabilitation of the offender³⁸. The concept of retribution is in no way an inherent part of Japanese mentality.

37 This was during the period when the number of reported criminal cases (not including traffic offenses) was at its lowest level after World War II (from 1967 to 1977).

38 The Supreme Court, Saibanin-saiban jisshijokyo no kensho-hokokusho (Report on the Practice of the Mixed Courts), December 2012 (available only in Japanese), p. 23:

http://www.courts.go.jp/saikosai/vcms_lf/80822003.pdf

http://www.courts.go.jp/saikosai/vcms_lf/80818006.pdf

TOWARDS THE COMPLETE ABOLITION OF CAPITAL PUNISHMENT IN MOROCCO: POSSIBILITIES AND CONSTRAINTS

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INTRODUCTION

The right to life is the most fundamental human right and underpins all other rights. Therefore, the growing global awareness of the philosophy of human rights has been linked to the hard fight against all threats, first and foremost the death penalty, to this sacred right, which was until the late 1970s considered a legitimate manifestation of the state's sovereignty to respond to certain serious crimes. However, the development and the spread of the Universal philosophy of Human Rights has strengthened the belief that such a sentence is unfair and illegal, since when

Hmimnat, S. (2014), Towards the Complete Abolition of Capital Punishment in Morocco: Possibilities and Constraints. In Arroyo, L., Schabas, W., Takayama, K., & Muñoz, M. (cords.). *Death Penalty: A Cruel and Inhuman Punishment* (pp. 71-89). Cuenca: Ediciones de la Universidad de Castilla-La Mancha.

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efforts have been intensifying to raise awareness of its unfairness and to abolish the death penalty from the legislation of the State.

The end of the Cold War era and the collapse of the Soviet bloc represented a turning point regarding the globalization of demands for the abolition of the death penalty. Abolition, in this context, becomes a reliable indicator to measure the progress of States' respect for universally recognized human rights².

Despite the promising steps made by Morocco on the path towards abolition, making many observers optimistic about this country becoming the first in the Arab and Muslim world to abolish capital punishment,³ the Kingdom remains hesitant in this regard, preferring to compare itself to countries such as Algeria, Tunisia, Mauritania and Lebanon that also have a «de facto» moratorium on executions.

This paper aims to provide a political analysis of the Moroccan experience in dealing with the issue of capital punishment that focuses on the possibilities and constraints that the political system faces, to make the transition from the status of *de facto* abolition, due to its moratorium on executions to *de jure* abolition. To capture the essence of such a problematic issue, this paper poses a simple question: why did Morocco, which halted executions 17 years ago, not abolish it completely despite all the pressures to do so? In other words, why can the Kingdom not shift from 'de facto' abolition' to 'legal abolition'?

THE LEGAL FRAMEWORK OF CAPITAL PUNISHMENT IN MOROCCO

Capital punishment is considered an 'original criminal penalty' and Moroccan legislation has detailed the different acts and crimes that warrant the death penalty and the procedural measures to be observed in implementing the penalty.

The various crimes punishable by death are listed in a set of laws: «the Penal Code», «the Anti-Terrorism Law», «the Military Justice Law» and the «Dahir (a King's decree) related to crimes against the nation's health»⁴.

2 See: SCHABAS, W.: «The abolition of the death penalty in international law», Cambridge University Press, Cambridge, 3rd Ed., 2002.

3 CHAMASS, M.: «Fighting against the Death Penalty in the Arab World, Protagonists, Arguments and Prospects», World Coalition against the Death Penalty, France, June 2008, pp 20-23; International Federation for Human Rights: La peine de mort au Maroc: L'heure des responsabilités (Mission international d'enquête), Paris, Octobre 2007 (N°480), p. 8-9.

4 All these laws are available in Arabic and French on the Ministry of justice's website: <http://www.justice.gov.ma>. The legal texts cited above were translated into English by the author solely for the purposes of this article.

Criminal Law

The majority of crimes punishable by the death penalty are set forth in the 1st part of the 3rd Book of the Penal Code.

Offences against State security: The Moroccan legislator has divided the offences that carry the death penalty into six sub-sections:

1. An attack on the life or the royal person of the King (163), an attack against the life of the Crown Prince (165), and against the life of a member of the royal family (167).
2. Crimes against external state security, including the crimes of treason and espionage in times of war and peace (181-182).
3. An attack on the internal security of the state, including acts intended to instigate civil war (201); taking unauthorized command of military personnel or installations (202) or an attack on the internal security of the state, at the head of armed gangs or in any leadership role (203).
4. An attack on the internal security of the state as a consequence of joint action between civil authorities and military bodies (234-235).
5. Serious crimes against magistrates and members of the forces of law and order that amount to wilful violence with murderous intent resulting in death (267); premeditated murder or intentional murder with malice aforethought that is qualified as assassination (393); the intentional murder of a parent or grandparent (396); the murder of a newly born baby (397); poisoning leading to death (398); the use of torture instruments or committing brutal acts in the course of a crime (399); assault and battery or violence or deprivation leading to the death of a child under 15 years of age (410); assault and battery, or violence committed by a parent or grandparent or any person acting as a guardian or with authority over a child under 15 years of age resulting in death (411-5); the crime of castration that results in death (412); the kidnapping, arrest, imprisonment or abduction of any person, followed by their physical torture or knowingly arranging a place or means of transport to do so (438-439); abduction of a minor that results in the death of the minor (474).
6. Intentionally setting fire to premises (house, apartment blocks, tent, cabins, ship, store, workshop, aircraft or vehicle) that are inhabited or intended for human habitation, whether the property of the perpetrator of the crime or otherwise. Intentionally setting fire to tankers, aircraft, vehicles or carriages some of which may be carrying persons (580); arson causing death to one or more persons (584); vandalism using explosives or any explosive objects referred to in article 580 (585); vandalism, or placing mines or other explo-

sives that destroy all or part of any public works (roads, barrages, dams, ports, factories) causing the death of one or more persons (588); wilful destruction or demolition of bridges, dams, roadways, ports and factories resulting in the death of another person (590); blocking or disabling traffic flows if it results in bodily harm, permanent disability, or death (591).

Military Justice Law

As a complement to the criminal law on „offences committed against the external security of the State«, articles 183 to 187 of the 10th section of the Law on Military Justice list the crimes applicable to military personnel that are punishable by death, which include: desertion and conspiracy to desert in war time (145); inciting desertion in war time (151); intentionally setting fire to or destroying or attempting to destroy, in war time, buildings, apartments, railways, communications centres, aircraft, ships, and all property pertaining to the army and the national defence forces (170-171); participation in a conspiracy to frustrate the decision of the military officer in command; inciting others to abandon the battlefield or obstructing a defensive action; (184); causing other military personnel to join the ranks of the enemy or rebels, providing the means to do so and recruiting for a foreign power at war with Morocco (187).

Anti-Terrorism law

The 03-03 Anti-Terrorism law fixes the death penalty for a number of offences already described in criminal law, but defines «Crimes of Terrorism» as having an intentional relationship with «an individual or collective plot that endangers public order through intimidation or violence», resulting in the death of one or more persons. These crimes include the following:

- Wilful assault on people's lives and their safety or liberty, kidnapping or abduction;
- Forgery or counterfeiting money or public credit, seals and imprints of the kingdom, names and brands;
- Destruction, damage, or degradation;
- Misappropriation or damage of an aircraft or ships or all other means of transport, installations for transport by land, sea or air and communications media;
- Theft and embezzlement of goods;
- The illegal manufacture, possession, transfer, promotion or use of weapons and explosives;
- Crimes related to automated data processing systems;
- Forgery or counterfeiting of checks or any means of payment;

- Participation in an association or a group established to perpetrate an act of terrorism;
- Knowingly receiving goods related to an act of terrorism;
- Anyone introducing a substance that endangers human health, animal health or the environment in the atmosphere, in the soil, or in the water (including territorial waters).

Dahir on crimes against the nation's health

The first chapter of the King's Dahir or Royal Edict stipulates that any person who consciously makes materials or products intended for human nutrition that endanger public health is punishable by death.

How is the death penalty carried out in Morocco?

Moroccan legislation regulates the process for the implementation of the death sentence. The Code of Criminal Procedure states in chap. II (Articles 601 to 607) that the Office of Public Prosecution should report all death sentences that are pronounced to the Minister of Justice through the Directorate of Criminal Affairs and Pardons. The death sentence cannot be implemented until appeals for amnesty to the Public Prosecutor, the Amnesty Commission and His Majesty the King have been exhausted. If the convicted person is a pregnant woman, she cannot be executed until two years after giving birth.

The mode of execution is by firing squad and is carried out at the orders of the Minister of Justice by the military authorities in the prison institution that houses the sentenced person or at any place designated by the Minister of Justice— at a location that will remain secret. Article 20 of the Code of Criminal Procedure authorizes the Minister of Justice to execute the sentence in a public place, but this not been habitual in the modern era in Morocco. The following officials are required to witness the execution: the President of the Criminal Chamber or nominated person who issued the sentence; a magistrate or judge from the region in which the execution is to be carried out; the director of the prison; a representative of the forces of national security or officers of the Royal Gendarmerie; the prison doctor or a doctor appointed by the Public Prosecutor; an Imam and two 'Adouls' (i.e. legal witnesses). If the convicted person is not a Muslim, then a representative of the faith which that person professes may attend.

After the execution, the body is handed over to the family, if requested, for burial in private, otherwise it will be buried by the competent authorities.

It is worth noting that the number of death sentences passed, in accordance with the above four laws, is in excess of 600 cases with criminal law accounting for 283

of them⁵. However, current plans to amend criminal law may reduce this to 11 cases, reflecting particularly «serious crimes of murder»⁶.

Official statistics indicate that nearly 50 persons were executed between 1963 and 1974, mostly for political reasons and only 2 between 1982 and 1993 for crimes under criminal law⁷. Although the system has fully pardoned all those sentenced to death (except 13), as of October 10, 2009, there were 129 persons sentenced to death (6 of whom women)⁸. At present, Amnesty International considers that Morocco is abolitionist in practice with regard to its application of the death penalty.

POLARISATION OF THE PUBLIC DEBATE ON CAPITAL PUNISHMENT IN MOROCCO

A sound understanding of Morocco's public debate on the death penalty requires a brief overview of the evolution of this debate; an analysis of the most important actors; the parties involved and their roles. This analysis will provide an authoritative grounding with which to understand the official position of the Moroccan state and how it manages the growing debate on the death penalty and its abolition.

Evolution of the public debate on the issue

The debate on capital punishment in Morocco is a recent event, as for a long time it has been a taboo subject that no one dared to discuss, compounded by the fact that it has yet to be of interest to a large section of the public and to influence public opinion, perhaps because this penalty has only been enforced on very few occasions. The last execution was that of a police officer, Mohammed Tabet, who was convicted and executed in 1993 on charges of the rape of hundreds of girls recorded on video cassettes.

The 'National Charter of Human Rights' proclaimed by three Human rights associations and two judicial professional bodies⁹ was established on Decem-

5 MADAD, Y.: «Death penalty in Morocco between partial and total abolition (in Arabic). Paper presented to the regional conference on the 'Death penalty in the Arab World», organized by the Amman Centre for Human Rights Studies and Penal Reform International, in Amman, July 3-2, 2007. This paper is available at www.achrs.org

6 According to a personal interview with Ms. Sabah Sekkate, Chef de Mission to the Director of the Department of Penalties and Pardons, Ministry of Justice, August 3, 2010.

7 These statistics are quoted in MADAD, J.: «Death Penalty in Morocco between partial and total abolition», op., cit.

8 Because of the difficulty of obtaining the latest official statistics on the subject, I rely here on some statistics kindly provided to me by Mr. Mustapha Znaidi, the representative of the OMD Hand 'CNCPPM' within the 'World Coalition against the Death Penalty».

9 These organizations are: Bar Associations in Morocco, the Association of Moroccan Jurists, the Moroccan League for Human Rights, the Moroccan Organization for Human Rights and the

ber 10, 1990. One of its clauses was to abolish the death penalty, which can be regarded as the first important initiative that sought to focus attention on this subject. Unfortunately, there has been little follow up due to other priorities, predominantly the issue of territorial unity (Western Sahara), terrorism, and social and economic crisis.

The staging of two key seminars, the first by a human rights association and the second by a governmental administration, were really pivotal moments in opening the public debate and deepening the degree of awareness on the issue. On October 10, 2003, the Moroccan Observatory of Prisons (founded in 1999) succeeded in organizing an international seminar on the «death penalty in Morocco between national laws and international conventions» providing an opportunity to enrich the body of literature in support of abolition. Participants at this seminar benefited from hearing the experiences of international organizations such as the Arab Penal Reform Organization and Together against the Death Penalty. The importance of this seminar may be measured by the results it obtained:

- Grouping the anti-death penalty voices within a coordinated national framework that encompasses several Moroccan associations.
- Connecting local action in an international context through the intensification of the Moroccan activists' presence in the global coalition against the death penalty, given that this seminar had a positive and strong echo that helped to gain representation within the Committee in charge of this alliance¹⁰.

The second event staged by the Ministry of Justice in Meknes [9-11 December 2004] was a national conference on 'Criminal Policy in Morocco: Reality and Prospects', which focused on reviewing and revising criminal justice policy particularly in the fields of criminality and the penal system in the Kingdom¹¹. This led to several recommendations, including one regarding the death penalty. The importance of this lively debate at a national and international level is that no official body had previously expressed concern over the issue.

These two seminars and the initiatives that followed¹² signalled the willingness of both civil society and the state to open up and extend the debate on the issue. In

Moroccan Observatory of Prisons.

10 MADAD, Y.: «Death penalty in Morocco between partial and total abolition», op., cit.

11 Ministère de la Justice: La politique criminelle au Maroc: réalité et perspectives. PADIJJ, Rabat, 2005, p. 6.

12 Such as the International conference organized by CCDH on October 11-12, 2008, and the conference organized in Marrakech by the Ministry of Justice on 'Criminal policy in the Arab world' on April 26, 2006.

an attempt to alter the perception that the debate was only for the elites, the administration became more engaged, perhaps in response to national and international pressure and shaped the debate in both political and legal terms. This developed into a more open discussion, which attracted national and international contributions with much of the discourse that reflected both support and opposition to capital punishment taking place online.

It is worth mentioning that the national public and private media channels are making a strong contribution to the formation of public opinion on the importance of this issue, expanding the public debate around it. On April, 6, 2005, 2M TV channel broadcast a program called *Mubasharatan ma'akum* (Live with you) on the issue, which featured the Minister of Justice's Advisor, the director of Dar Al-Hadith Alasaniya (an official religious establishment), and a former death row convict who had spent 23 years in prison and who had benefited recently from conditional release.

The same channel, in December 2006, broadcast a sixty minute documentary on death row, where a group of the condemned were interviewed from inside their cells, together with officials and the families of both the victim and the condemned person. This initiative was considered a precedent in the Arab media world.

The first National channel broadcast an episode of a legal documentary entitled 'Mudwala' on June 15th 2008, which dealt with the experience of a citizen who had disappeared under mysterious circumstances before his body was found dismembered and thrown into a well.

In addition, the national press has focused attention on the issue. Newspapers such as *Le Matin du Sahara et du Maghreb*, *l'Economiste*, *Maroc Hebdo International*, *Libération* and *Aujourd'hui le Maroc* regularly publish articles on capital punishment and aspects of the debate over its use.

Social trends and the political actors involved

Discussions surrounding capital punishment remain problematic and controversial with no clear agenda. The national debate though modest is pierced in general by three major trends which can be reviewed as follows:

- The call for the complete abolition of the death penalty: This trend is represented mainly by active civilian associations in the human rights field, which came together in 2004 as The Moroccan Coalition against the Death Penalty. This call includes three key demands: 1) abolition of this punishment from the law; 2) stop passing death sentences; and, 3) a moratorium on executions.

These demands being premised on the fact that the universal right to life cannot be guaranteed, as the probability of error in the implementation of the death penalty is inevitable and irreversible, compounded by the fact that there is no evidence that the death penalty is a unique deterrent.

Followers of this trend in Morocco add another reason to explain why there is no justification to keep the death penalty, given the political stability the Kingdom has been enjoying since the nineties and the fact that there have been no executions for 17 years.

- The call to retain capital punishment: adhering to this position are victims such as those of the terrorist attacks that occurred in Casablanca on 16 May, 2003, as well as voices from within the legal profession who consider it a fair and effective punishment, because it prevents re-offending and meets society's best interest and preserves its stability and security.
- The call for the incremental abolition of capital punishment: this approach supports the gradual reduction in capital crimes, especially crimes of intentional homicide associated with aggravating circumstances. In fact, the government has already adopted this approach as a compromise position between the first two trends above, whilst public opinion is prepared for the move to abolition.

The following is a brief review of the main parties that reflects in one way or another the above trends:

Human Rights associations

This movement has its roots in the formation of the National Charter of Human Rights and led to the establishment, in 2003, of the Moroccan Coalition against the Death Penalty; a coalition formed of seven active national associations in the field of Human rights, namely:

- The Moroccan Observatory of Prisons
- The Moroccan Association for Human Rights (AMDH)
- Moroccan Forum for Truth and Justice
- The Moroccan Organization for Human Rights (OMDH)
- Moroccan lawyers Bar Association
- Amnesty International-Moroccan section
- Centre for Peoples' Rights

The coalition has identified a set of objectives, including:

- Definitive repeal of the death penalty from Moroccan legislation;
- That national courts immediately cease to pronounce the death penalty;
- Revision of all death sentences, commuting them to terms of imprisonment;
- Ratification of the Second Optional Protocol to the United Nations' International Covenant on Civil and Political Rights;
- Ratification of the Rome Statute of the International Penal Court;
- Reinforcement of co-operation and solidarity ties within the world abolitionist movement.

Since its foundation, the coalition has succeeded in establishing itself as a lobbying bloc to encourage Morocco to join the international trend towards abolition of the death penalty. In this regard, the coalition has made several moves and activities intended to pressure politicians and mobilize support around the goals and demands that it advocates. The most important initiatives staged in this regard were:

- A field visit on April 19, 2005 to the Hay Al-i'dam (b-c) (neighbourhood penalty) in Kenitra city, which hosts the central prison that receives more than 90% of those sentenced to death, followed by the drafting of a report that was sent to the Minister of Justice, demanding improvements in the living conditions and the reduction to life imprisonment of their sentences;
- Organization of a national campaign on 28 April 2005 with the slogan 'For the abolition of the death penalty';
- Contribution to drafting the first oral question on the issue in the parliament in May, 2005, asking the government about its projects regarding the abolition of death penalty;
- As a representative member in the World Coalition against the Death Penalty, the national coalition played an important role in hosting the annual international coalition in Morocco, on 19-20 of June, 2006;
- Sending a letter to the Prime Minister in November 2007, where he was invited to adopt and to vote for the proposal of the General Assembly of the United Nations' proposal calling for a moratorium on executions.

In addition to these initiatives, the coalition's founder associations undertook a number of unilateral moves, such as in the case of the campaign mobilized by Amnesty International- Morocco, in 2006, under the slogan 'A New Morocco without the death penalty'. In addition, the Executive Office of the OMP presented an appeal to the His Majesty the King on October 9, 2007 asking him to replace

the death penalty with alternative punishments¹³. In a similar vein, the Moroccan Organization for Human Rights wrote to the Prime Minister (November 23, 2007) and the Minister of Foreign Affairs and Cooperation (September 14, 2007) asking them to vote in favour of the moratorium resolution (AC3/62/L29) at the Third Committee of the General Assembly of the United Nations on November 17, 2007.

Whilst the abolitionist movement has registered itself on the political landscape and achieved a number of significant gains nationally and internationally within a short time, they have neglected to address two very important issues namely, the needs and rights of the families of the victims (16 May victims, for example)¹⁴ and alternatives to the death penalty. Failure to do so risks the accusation that the movement is soft on crime and unsympathetic to the needs of victims and civil society.

Political parties

Few political parties have declared a clear position on the issue, because it remains contentious and controversial. This reluctance is compounded by the State's equivocal position and the insecurity of political parties in general.

The Democratic Forces Front was the first party to take the initiative to progress the debate by the introduction of a draft bill in parliament to abolish the death penalty¹⁵. In this venture they were supported by the Socialist Union of Popular Forces (USFP) and the Progress and Socialism Party (PPS), with no positive outcome, as the government neglected it. In 2006, the same parliamentary group (FFD) organized a study day on the subject with the attendance of other parliamentary groups and members of the Moroccan Coalition against the Death Penalty. In the same vein, Nouzha Skalli a PPS deputy¹⁶ tabled an oral question to the Justice Minister on May 11, 2005, concerning the government's plan to abolish the death penalty.

On the other hand, it should be noted that during the international seminar organized by the World Coalition Against the Death Penalty held in Paris in February, 2007, three parties- the USFP, PPS and the FFD - publicly committed themselves to initiate a political campaign against the death penalty during the legislative elections, to be held in September, 2007, although they failed to deliver on their promises.

13 See the full text of this letter in *Al-itihadal-ishtiraki* (Moroccan newspaper), October 10, 2007.

14 In fact, many Human Rights movements around the world suffer from this weakness. See HODKINSON, P.: «Capital Punishment: Meeting the Needs of the Families of the Homicide Victim and the Condemned», in HODKINSON, P./SCHABAS, W.A. (eds.): *Capital Punishment: strategies for abolition*, Cambridge University Press, Cambridge, 2004, pp. 332-357.

15 This bill was introduced by Bouchra Khiari, member of the FFD party.

16 Nouzha Skalli is a member of the political bureau of the Progress and Socialism party, and she is currently the Minister of Social Development, Family and Solidarity in the Morocco's government.

Opposition to this approach is expressed by the Justice and Development Party [PJD], an Islamist legal party, whose preferred agenda is to ‘limit the death penalty, but not to abolish it completely’¹⁷. This compromise position was justified by Mustapha Ramid, a lawyer and member of the PJD General Secretariat. He said: «We are neither in favour of the complete abolition of the death penalty, nor in favour of keeping its status as it is, because it is terrifying and horrifying and doesn’t provide sufficient guarantees to defendants. Rather, we are in favour of reviewing the crimes punishable with the death penalty and restricting them to dangerous crimes only. Political crimes should not be punishable with the death penalty»¹⁸. Al Ramidal called for the right of victims’ relatives to pronounce on a pardon, in order to spare perpetrators this penalty. Moreover, he is of the opinion that the penalty should not be implemented except after a reasonable period of time (e.g. 10 years), in order to avoid the consequences of any miscarriages of justice.

As noted in this justification, the Islamic party based on its religious foundation has tried to develop a politically correct position, striking a balance between humanitarian considerations, the public interest of society and its need for equity and justice. It seems that the Islamic party has been aware of the political system and its constraints, adopting a conservative perception of a ‘political party, leaving the religious justification to the Unification and Reform Movement (MUR), which is in fact the advocacy wing or the religious façade of the PJD¹⁹.

Islamic movements & the official religious establishment

The Islamic landscape includes several trends and religious groups, the most important of which are the Unification and Reform Movement (Harakat Al-islah wa al-Tawhid), the Justice and Spirituality Movement (Jamā’at al-’Adl wal Ihsān), and the Salafi tendency. Up until now, there have been no official statements or clear positions reflecting these groups’ views on the death penalty debate, although there are some statements from which it is possible to glean their real or presumed positions.

Regarding the Unification and Reform Movement, Ahmed Rissouni, a former head of the MUR and one of its key ideologues, believes that the death penalty as stipulated in the Moroccan Penal Code, ‘has nothing to do with capital murder as it is known in the Islamic Sharia,’ and likewise ‘the Islamic retribution law (ة ي ع ر ش ل ا ة ب و ق ع ل) does not figure in Morocco’s criminal legislation’.

17 Interview with Al-Ramid, see www.Magharebia.com, published on January 1, 2008.

18 Ibid.

19 For further information about the historical connection between this party and the MUR, see HMIMNAT, S.: «The Moroccan Justice and Development Party: Pangs of birth and challenges of integration» (in Arabic). Wijhat Nazar, N° 36-37, 2008, pp.33-38.

So, the abolition of the death penalty, rather than contrary, is, in fact, close to Islam, which considers it more appropriate to save the blood and lives'²⁰.

Contrary to this flexible and positive position, the Justice and Spirituality Movement, considered the largest Islamic group in Morocco, expressed a different viewpoint on the issue. When the late Driss Benzekri (former Chairman of the CCDH) stated, at the Third World Congress Against the Death Penalty, that Morocco was close to abolishing the death penalty, a voice from this movement commenting on his statement, said that 'it has nothing to do with Islamic law', due to the fact that many crimes punishable by death 'are not compatible with Islam' as the philosophy of Morocco's legislation 'is basically so far from the spirit of Islamic Law'.

In addition to these positions, it should not be forgotten that the Salafi groups, through a number of advocacy associations and Koranic schools, are adopting a more radical position on this subject based on a literal interpretation of the religious texts. Although there is no clear statement on this issue, it is reasonable to expect a radical anti-abolitionist position, similar to examples already addressed in a newspaper that reflects the actual positions of these Salafist groups²¹.

On the other hand, it is noted that the official religious establishment, represented by the Moroccan Ministry of Awqaf and the Ulemas councils, continue to adopt a reserved position on this topic, although some from the establishment have recently started to express their views on the subject. For example, at the CCDH seminar in October 2008, Ahmed Abbadi, President of the Mohammedia League of Moroccan Ulama, presented a paper²² in which he stated that it was possible to interpret from Islamic Sharia that there are 'a set of windows to reduce and limit recourse to the death penalty', if not to make it impossible. He added that another guarantee that exists in this regard is the fact that the final decision on the implementation of this penalty is in the hands of the King who is the 'the Defender of the Faith'.

The Director of Dar Hadith el Hassaniyah, an official religious educational institution, assumed a different position, when he stated that Moroccan criminal law exaggerated the crimes punishable by death, particularly those for political crimes or criminal attempts, but on the other hand he believed that the demand for abolition of the death penalty is 'excessive in so-called human rights which should have limits'²³. Khamlishi appears to believe that 'total abolition is excessive and also a violation of

20 Interview with «Al» adalawa Tanmiya newspaper», republished on Rissouni's website: www.raissouni.org.

21 Look for instance at the weekly newspaper called «Al-Ssabil».

22 AHMED, A.: «Capital punishment in the Islamic jurisprudence» (in Arabic), in CCDH&ECPM (Ed): Seminar on the death penalty (Rabat, October 11-12, 2007), 2008, pp. 29-34. Article in French available at www.westminster.ac.uk/ccps.

23 Interview with Ahmed Khamlishi, Al-sahraal-maghreb (Moroccan daily newspaper), February 2, 2007.

the people's rights. For some killers, it does not seem acceptable to abolish capital punishment in the name of the sanctity of life, especially for those victims who lost their lives in cold blood through despicable crimes- they have no right to the sanctity of life. We read in newspapers about some ugly crimes, which I see as not worthy of the protection of the lives of their perpetrators on the basis of human rights, at the expense of security and society's rights or out of respect for values and principles.²⁴

Official bodies

There are two official bodies actively engaged with the public debate on the issue, the Ministry of Justice and the CCDH.

The Ministry of Justice

The Ministry of Justice has been involved in the issue since 2004, when it staged a national symposium on the status and prospects of criminal policy, during which the issue of capital punishment was discussed and led to a set of recommendations, including one stating that Morocco should be 'reducing the application of the death penalty and abolishing it gradually (...) and requiring a unanimous decision by the judges before pronouncing this penalty'.²⁵

Indeed, the same Ministry did establish a special committee to prepare a preliminary draft of a revised criminal law in light of the recommendations. The Justice Minister Mohammed Bouzoubaa urged the Committee to pay special attention to the application of the death penalty and life imprisonment, 'taking into account all the intellectual and human rights tendencies to arrive at what serves the best interests of the country'.²⁶

Speaking before the UN Commission on Human Rights, the Minister proclaimed that the promotion of human rights in Morocco is irreversible, noting that his ministry works to reduce the death penalty and that the draft amendment to the Criminal Code would shortly pass through the parliamentary legislative channels.²⁷ In a press statement, the same minister went so far as to say that the 'political and human rights willingness is there to move easily towards the total abolition of the death penalty', asking for more time in order for 'things to become clear' whilst Morocco's judiciary assesses its liability in the application of death penalty, taking into account all the existing trends.

24 Ibid.

25 Ministère de la Justice: La politique criminelle au Maroc: réalité et perspectives (tome2). op.cit, p. 562.

26 Al-itihadal-ishtiraki (Moroccan newspaper): April4, 2005.

27 Al-itihadal-ishtiraki: March 17, 2005.

Two weeks prior to the UN General Assembly vote in December 2007, Abdelwahed Radi, the justice minister who replaced Bouzoubaa, announced in Parliament that Morocco would not support the UN resolution, explaining that '[T]here is controversy between the defenders of the abolition of the death penalty and the defenders of maintaining it. We are abstaining from voting on the abolition of the penalty because we have not yet resolved the issue'²⁸, he said. He later added that 'Morocco has a strong desire not to apply such a penalty by our courts, because it is no longer acceptable'.²⁹ Only 2 of the 133 people sentenced to death since 1973 have been executed, the last execution had been carried out 14 years ago, Radi noted.

It is noteworthy that some human rights activists saw a sort of 'regression' in the position of the Ministry of Justice in 2007. They linked this decline to a wider 'political regression', which occurred after the Legislative elections of September 2007, in protecting freedoms and maintaining the leading position previously adopted by former minister Bouzabaa.³⁰ However, another activist offered a different interpretation, arguing that the human rights movement should have highlighted some of the positive points in Radi's statements, such as his call for judges to stop issuing death sentences. Moreover, he accused the human rights movement, particularly the Moroccan Coalition against the Death Penalty of weakness and the absence of any internal democracy in running its own affairs, which turned this coalition into a 'Charitable' organisation that probably caused the above-mentioned 'regression'.³¹

The Advisory Council for Human Rights

In 2005, the 'Equity and Reconciliation Commission' (IER) completed its work and issued its final report. One of its concluding recommendations was the abolition of the death penalty as a necessary step to completing the reconciliation process³². The Advisory Council on Human Rights (CCDH) is charged with implementing the IER's recommendations. In this regard, it contributed, especially during the mandate of the late Idriss Benzekri, to mounting pressure on the state 'from within' to adopt an advanced attitude towards this issue. During the closing session of the Third

28 These statements are quoted on the website: www.Magharebia.com 2008-01-08.

29 Ibid.

30 This interpretation is expressed in an interview with Mr. Mustapha Znaidi, the representative of the OMDH and 'CNCMP' within the 'World Coalition against the Death Penalty', on 1st September 2010.

31 Interview with Mr. Youssef Madad, one of the founders of the 'CNCMP' and a former representative of both the Moroccan Observatory of Prisons and Moroccan Coalition within the World Coalition Against the Death Penalty, on September 3, 2010.

32 Final Report of the Equity and Reconciliation Commission - The components of reform and reconciliation (Volume 4) CCDH, Rabat, 2009, p. 80.

World Congress against the Death Penalty [February 2007], Benzekri confirmed that ‘studies and procedures required to ban capital punishment have been conducted to adapt the national legislation to the international conventions, and the criminal legislation reform project which is supervised by the Justice Ministry, is now at a very advanced stage. He expressed his hope that this work would be completed in Parliament, before the end of the current legislative session (i.e. before April 2007). Although this wish did not come to fruition in time, prompting some Human rights activists to accuse the CCDH of going back on its word and delaying taking up the torch after the late Benzekri’s statements on abolition, the CCDH is still making efforts and adopting initiatives considered highly important to stimulate the public debate on this subject. On October 11-12, 2008, the CCDH organized in partnership with the French human rights organization ‘Together against the Death Penalty’ [ECPM], an international Seminar on the death penalty. Over two days, more than 140 people, parliamentarians, judges, lawyers, government officials, experts, researchers and human rights activists took part in this conference, the main purpose of which was the opening of a ‘serious scientific and objective debate’ on capital punishment to include all of Moroccan society, to hear and discuss the different opinions, and to explore all trends and in-depth arguments, in order to reach an agreed outcome, ultimately, between them all.³³

CAPITAL PUNISHMENT –BETWEEN RETENTION AND ABOLITION: FUTURE PROSPECTS

The future of capital punishment in Morocco is related to the state’s vision and the different actions it may take to resolve both the sensitive and the complex issues regarding the formalisation of capital punishment’s abolition in the Kingdom. There are two possible ways: either to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, which calls upon countries to abolish this punishment, while allowing the initiation of the modification process of the national criminal legislation to delete everything related to capital punishment and replace it with alternative sanctions. Or, to let the legislative power (parliament) decide on abolition through amendments to criminal law, replacing the death penalty with alternative penalties.

In both cases, the final decision is up to the Monarch, in view of his superior status and the strong legal powers he enjoys under the Moroccan Constitution. Whilst there has been a moratorium on executions since 1993, this is not abolition because Moroccan courts are still issuing death sentences based on the applicable

³³ See the introductory speech of the President of CCDH Ahmed Harzenni to the conference mentioned above, pp. 17-18.

legal texts. Morocco's abstention during the vote in favour of the resolution on moratorium in the Third Committee of the General Assembly of the United Nations on November 17, 2007, can be regarded as a clear signal that reflects an undecided official position in this regard. Some human right actors have expressed positions in contradiction to the State or have complained of an unjustified extension of the uncertainty that has lasted over a decade and a half. But, on the other hand, this vote could be seen as careful behaviour and normal vigilance of the state imposed by the sensitivity of the subject and the controversial issues it raises, which means that more time is needed before a final decision is taken to resolve this issue. In other words, although the political will is there to move to abolition, it seems that this option faces many obstacles and constraints which can be summarized briefly in the following three major points:

- The lack of political and societal consensus on the subject, as there is no compromise yet between the various sectors in society and the political bodies involved in this critical issue, which means that the system should wait before any crucial decision is taken on the matter. Thus, it is a mistake of believing that the issue will be resolved by the simple expedient of tabling a Bill before parliament as this step is predicated on achieving some sort of consensus in Morocco's society.
- The weight of traditional and religious reference: As a Muslim Arab state, it would be difficult for the Moroccan legal system to achieve total abolition of the death penalty, given the weight of the traditions and Islamic teaching. To remove the death penalty from the statute books would be seen, by some, as a state that is disrespectful of preferences grounded in religious convictions,³⁴ while it is still an essential source of the monarchy's legitimacy and its philosophical rule.³⁵ The state's cautious respect of the religious dimension, inspired by French positive legislation, which it will not neglect, so as not to pull the rug out from under both the moderate and radical Islamic groups, is a significant part of the Moroccan legal arsenal. Some may try to exploit this issue to embarrass the state and to challenge its religious credentials, all the more so as it would be easy to mobilize and

34 To understand the religious dimension of the death penalty issue, see among others SCHABAS, W.: *Islam and the death penalty*, Quebec University, Montreal, 2002; BASSIOUNI, M.C.: «Death as a Penalty in the Shari'a», in HODGKINSON, P./SCHABAS, W.A. (eds.): *Capital Punishment: Strategies for abolition*, Cambridge University Press, Cambridge, 2004, pp. 169-184.

35 See among others, MONSON, H. Jr.: *Religion and power in Moroc*, Yale University Press, New Haven and London, 1993; TOZY, M.: *Monarchie et Islam politique au Maroc*, Presses de Sciences Po, Paris, 1999; HAMMOUDI, A.: *Master and disciple, the cultural foundations of Moroccan authoritarianism*, The University of Chicago Press, Chicago, 1997.

to manipulate ‘public opinion’ so that it would adopt any idea or position by appealing to its religious sentiment.

We need to acknowledge that the religious establishment, in seeking responses to meet the demands of the abolition movement, argues that the Sharia provides ‘windows’ to limit the application of the death penalty but not to abolish it completely³⁶, given that the death penalty is already provided for in the Koran subject to rigorous conditions on its application.

- Constraints to maintain public security: terrorism and the growth of organized and moral crimes which shock the public make the state’s task of abolishing the death penalty even more difficult. There is a secure current inside the state which is strongly opposed to the ‘indulgent tendency and sharply defends the importance of strengthening the common feeling of physical and moral security within the society. The anti-terrorism Law passed by the Moroccan Parliament in May, 2003³⁷, under which some ordinary crimes punishable with the death penalty, if they are considered to be terrorist crimes, can be considered a living embodiment of this trend.

CONCLUSION

This paper has sought to summarize the core issues that are framing the current public debate on the death penalty in Morocco. Generally, it should be emphasized that in early 21st century Morocco, there are no hostile attitudes towards the call for open debate on this issue, which can be considered in itself as an important advance, although this debate is still at an early stage and needs more time to mature, which could lead to modest progress that may be acceptable to some of the different parties concerned. Up until the present, the monarchical authority appears to be observing the debate carefully and waiting for it to mature before engaging in it further.

Throughout its history, the conservatism of the Moroccan political system has avoided taking too many risks, when it comes to maintaining the state’s principles and societal balances to ensure its continuity. Capital punishment, like some other issues which intersect the local specificities with the universal referential cannot be solved by adopting radically different approaches as illustrated by the strategy that brought about fundamental improvements in family law. The lesson learnt from the latter is how to work with such divergent views, to avoid confrontation between many agencies with contradictory ideologies, so as to bring about improvements

³⁶ See ABBADI’s paper on «Capital punishment in the Islamic jurisprudence», op., cit.

³⁷ This Law was adopted in the immediate aftermath of the suicide bombing attacks in Casablanca which killed more than 41 people.

in the status of women³⁸. The new Family code, which was ratified in 2004, can be considered as the fruits of thoughtful political management that was able to resolve differences and accommodate the views and demands of the different actors involved in the case.

Taking into account the above ideas, I believe that the Moroccan system is currently about to reduce both the scope and the application of capital punishment in a significant way in the medium term, whilst preparing public opinion for total abolition.

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³⁸ To have an idea about this ideological and political debate on women issues in Morocco, see HMIMNAT, S.: «The Religious Policy of the Ministry of Habous & Islamic Affairs in Morocco 1984-2002», (in Arabic). PhD thesis in Political Sciences, Mohammed V University, 2009, (chap. 5), pp. 238-308.

CONCERNING THE DEATH PENALTY ABOLITION: A LONG ROAD¹

SERGIO GARCÍA RAMÍREZ

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My beloved –as well as generous- friends, Luis Arroyo Zapatero, President of the International Society of Social Defence- and Rafael Estrada Michel, director of the National Institute of Criminal Science, have invited me to add a few lines to the Mexican edition of the opusculé *Francisco de Goya. Against the cruelty of the death penalty*. Certainly, this collective work of great excellence, hardly requires my lines. It already had, in its Spanish edition of this same year, 2013, magnificent contributors. They covered a wide horizon from various perspectives: Arroyo Zapatero, himself, in a substantial study on Goya, the cruelty of the criminal system and capital punishment; Federico Mayor Zaragoza, promoter of abolitionism, «A question of respect for human rights», José Manuel Matilla, erudite connoisseur of Goya's style in «*Caprichos, dibujos y desastres de la guerra*», and Juan Bordes, purveyor of historical interpretations on «*Los Desastres ...*», which the Spanish painter documented in depth, as a lesson for his contemporaries and his successors, until the horror abates and peace shines forth.

García, S. (2014), Concerning the Death Penalty Abolition: A Long Road. In Arroyo, L., Schabas, W., Takayama, K., & Muñoz, M. (cords.). *Death Penalty: A Cruel and Inhuman Punishment* (pp. 91-98). Cuenca: Ediciones de la Universidad de Castilla-La Mancha.

1 Translated from the Spanish into English by Antony R. Price.

At the risk of interrupting the unity of the work, I offer these lines to my friends who requested them, if only to leave a record of appreciation and solidarity with the end purpose of this work: to awaken a love of life and to distance the tribulations of punitive death, now in its last hours. I learnt of the work to which I am adding my comments when I attended the Preparatory Conference for the 5th World Congress against the Death Penalty, which was held on June 11th, 2013, at an unsurpassable location: the Royal Academy of la Real Academia de Bellas Artes de San Fernando, in Madrid, with the hospitality of this illustrious corporation and at the behest of the Academic Network against the Death Penalty. A flourishing partnership between the host that opened his house, and the academics that brought their thoughts, met together and united around as just a cause as ever there could be².

The death penalty –a punitive death, therefore, by the hand of the State and in the name of the law and of justice, or what is qualified as such, in a dark conspiracy- is taking too long to die. It resists the dying of the light. It argues in its favour and perseveres in a certain number of countries. Its most convenient –and questioned- motives are retribution and exemplarity. It is true that abolitionism has taken steps forward in the battle waged against death, but it is also true that in some parts the death penalty, pursuing the fate of its victims, refuses to die. It perseveres, whether frequently, silently, or openly applied and executed, whether it retreats back to what we have called «*de facto*» abolitionism, a sort of sword of Damocles that hangs over life, although it now has no intention, no will, nor occasion to fall upon the accused for the shock –or satisfaction- of the crowd. It is in adjournment, which will perhaps –and which often does as a rule, although not invariably- culminate in the plain and simple dismantlement of the scaffold and everything that it entails, the drop of poison that contaminates the lifeblood of the criminal system, as our cherished friend Antonio Beristáin said³.

The death penalty has been, is, and will be a major theme of criminal justice, which is, in turn, a great topic of freedom and democracy. The fundamental decisions of society and of the State –to each and everybody for their sake- pass through criminal justice, which accumulates a balance of graces and disgraces, perhaps

2 I have referred to this matter before in articles that I retrieved for the preparation of this introduction, which are: Itinerario de la pena, Seminario de Cultura Mexicana, Mexico, 1997, reprinted in Criminalia, Revista de la Academia Mexicana de Ciencias Penales, Mexico, year LXIII, num. 1, Jan-Apr 1997, pp. 179-199; in Cuadernos de Jalisco, Mexico, num. 1, May 1997, pp. 11-30, and in Itinerario de la pena, Marcos Lerner, Editora Córdoba, Argentina, 1999, pp. 31 and ff. Likewise, cfr. «Una reflexión jurídica sobre la muerte», in GARCÍA RAMÍREZ, S.: Cuestiones jurídicas en la sociedad moderna, Seminario de Cultura Mexicana/Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, Mexico, 2009, pp. 201 and ff.

3 «Pro y contra la pena de muerte en la política criminal contemporánea», in Cuestiones penales y criminológicas, Reus, Madrid, 1979, p. 579.

greater than that recorded in the chronicles of the crime, which criminal justice fights, so it is said, in the name of peace and reason. In the march of history that never ceases goes the legion of «deaths foretold» –as Zaffaroni puts it-: those that «in a massive and standardized way cause the operational violence of the criminal system»⁴. We have lived with punitive death for thousands of years and, throughout that time, have stored up the most serious allegations against its legitimacy and utility. This ritual exercise of violence, testimony of the Weberian monopoly, -paradoxically- constitutes the most vital expression of the encounter between the Leviathan, with all its strength, and the naked man, with only his dignity as a shield, which is no small thing, but not enough to disarm the power of the public and the executioner that wields, in their name, the authority to suppress life. We are still there, fighting for moratoriums in the application of the punishment and feeding the hope that soon –so that present generations see it, with honour and satisfaction- the white flag will be raised all over the world that announces the final victory of life.

This punishment, which is found on the frontier between barbarity and civilization, has not, however, constituted the severest of sanctions devised by man. Death is the objective, the culmination, the final act of the punitive rite; but the system that approves it was dreamt up to prepare it, accompany it with torment, in such a way that this would exceed the horror of death, until it made it desirable and liberating. An aggravated death penalty was fervently and profusely applied. Life had to be slowly extinguished, in the midst of the most atrocious punishments. Not for nothing did Michel Foucault open one of his revealing works with the frightening narration of the supplice of Damians⁵: first he had to suffer; then –and only then– could he die. The «soft customs» of the old continent provide narratives of the same tenor. It was usual (to quarter the sentenced prisoner) and to fling the four quarters to the four directions of the wind-rose, often in four frontier cities of the kingdom⁶. In England, the breasts of witches «were opened and the heart taken out and thrown into the fire. All outdoors and perhaps beneath that typical English drizzle»⁷. The various etchings of Goya in the series *Los desastres de la guerra* (*Qué hai que hacer más?* and *Por qué?*) that figure in this edition bear witness to extreme cruelty, blind brutality.

In the history of –let us say– punitive benevolence, certain forms of killing were instruments of piety. According to their inventors, the guillotine, the garrote, the

4 Muertes anunciadas, Ed. Temis/Instituto Interamericano de Derechos Humanos, 1993, pp. 11-13.

5 Cfr. Vigilar y castigar, trad. Aurelio Garzón del Camino, Ed. Siglo XXI, Mexico, 1972, pp. 11 and ff. This is a reference to Michel Foucault's Discipline.

6 VON HENTIG, H.: La pena. Formas primitivas y conexiones histórico-culturales, trans. José María Rodríguez Devesa, Espasa Calpe, Madrid, 1967, vol. I, p. 373.

7 RAMOS BOSSINI, Procesos por brujería en la historia del derecho (Inglaterra, siglos XVI y XVII), Ed. Mezquita, Madrid, 1984, p. XVI:

hangman's noose, the electric chair, the gas chamber, and the lethal injection have served such a purpose: death is swift, without great suffering. The French doctor and deputy M. Guillotin reaffirmed before the Constituent Assembly, in a speech on January 1st, 1789, in the midst of the French Revolution, that *avec ma machine, je vous fait sauter la tete d'un clin d'oeil, et vous ne souffrez point*⁸. Excellent, sweet promise! Parliamentarians moved by the thought that one day they may parade beneath that devastating apparatus would do well to consider it; better than under the hatchet or by the sword, less sure and certain.

And along the same lines, we find the subsequent arsenal of «benevolence», to which I have just referred, although the executioner and onlookers harboured their doubts and rigorously exercised them. Hardly yesterday -1997- the media reported that a minor defect in an electric chair installed in the prison of Starke, in Florida –a chair built in 1923-, meant that the execution of Pedro L. Medina literally set him on fire, unleashing a medieval *auto-de-fé* upon the executed prisoner. Note the Spanish name of the executed prisoner. Bob Butterworth, the attorney, went down in history with a sententious phrase, in more than one sense: «People who wish to commit murder better not do it in the state of Florida because we might have problems with our electric chair»⁹. And the leaders of the majority party in the local Senate, Locke Burt, did not lose the opportunity to pontificate, with absolute clarity: «death is no punishment, without suffering»¹⁰.

Years before the gallows were enclosed, in modesty and silence, between prison walls, removed from the general view, punitive death had another traditional and deliberate feature: fragrance, a spectacular condition, a requirement for general prevention and popular entertainment, terror and festival. Lardizábal made it clear: «one of the most essential purposes of punishments (...) is the example that they give, so that they serve as a lesson for those who have not offended and so that those people abstain from doing so, and for this reason we have said that punishments should be in public»¹¹. In the etchings of Goya, included in this book, we see the public gathered together, attentive, in an expectant line around the garrotted prisoner (*Por una navaja and Muchos han acabado así*).

Jeremías Bentham asks what a public execution is and replies with an exact and concise description: «It is a solemn tragedy that the legislator presents to the gathering of people»¹². There are abundant narratives on the detailed, clamorous, celebra-

8 [with my machine, I make your head roll in the twinkling of an eye, and you don't suffer at all] Cfr. LENOTRE, G., *La guillotine et les exécuteurs des arrêts criminels pendant la Révolution*, Lib. Académique Perrin et Cie., Libraires-Éditeurs, Paris, 1927, p. 216.

9 «Flames erupt Turing Florida execution», *USA Today*, 26 March 1997.

10 «Despite FIRE, electric chair is defended in Florida», *The New York Times*, 27 March 1997.

11 Discurso sobre las penas contrahido a las leyes criminales de España, para facilitar su reforma, Ed. Porrúa (1st. ed. facsimile), Mexico, 1982, p. 51.

12 *Tratados de legislación civil y penal*, trans. Ramón Salas, Editora nacional, Madrid, 1981, p. 308.

tion of death, in full view of the multitude called to the great drama of deprivation of life, in the midst of parades, proclamations, drum rolls, processions, death with uproar, places reserved for the more fortunate spectators, the spread of fear.

In the old practice of New Spain, «the judicial executions were done with an imposing apparatus»; the condemned prisoners marched in a column, «in front of them and behind them guards on foot and on horseback, judicial guards and many people bearing lamps with lit candles like in processions». A «great many clergy of different orders (...)» passed by «reciting prayers and religious maxims». At some point along the way, the procession met the Lord of Mercy. Once the supplice was over, the pulpit was put in place; a priest «gave a sermon on the crimes that had led those misfortunate beings to such a sad end»¹³.

As with other punitive measures, the death penalty has its own personalities. If prison represents custody, the prison governor, the jailor –various names for a single mission: deprivation of freedom-, then capital punishment has a characteristic, none better is known and feared in the broad ranks of justice: the executioner –a man and a name for a single mission: deprivation of life. In the scenography of death, once the role of the judge is over and the prayers of the clergy run dry, the executioner occupies centre stage in the small square, now contested by none. All eyes fall on him and only he provokes the sighs.

There were notorious families, family lines of executioners, who passed the trade down from generation to generation, perhaps with secret pride. The executioner in the novel by Pär Lagerkvist, «enormous and impressive, with his blood-red clothes», announced to those observing him, caught up in «such a profound silence that the rhythmic sound of breathing could be heard»: he exclaims: «I have been at my work since the beginning of time and the time for it to end has still not come (...) I am the one that stays, while everybody passes on»¹⁴. Among the executioners there were hardened professionals who fulfilled their mission to perfection: the Sanson family were like that, it is said. The beheading of the king appears in their bill of services. Alonso Ramplón of Segovia figured among the most adept executioners. Quevedo said of him that he was «an eagle at the task»¹⁵.

When Mexico declared its independence –not an act; a long and eventful process– it retained its earlier laws and customs. Some, worn down, came from the precolonial era; others, from colonial times. And they all brought with them the reti-

13 RIVERA CAMBAS, M.: México pintoresco, artístico y monumental, Ed. del Valle de México, 1974, vol. I, p. 249.

14 El verdugo y otros cuentos, trans. Fausto Tezanos Pinto, Emecé Editores, 3rd reprint., Buenos Aires, 1957, pp. 52-53.

15 Historia de la vida del Buscón llamado Don Pablos, ejemplo de vagabundos y espejo de tacaños, Aguilar, Madrid, 7th. ed., 1974, p. 34 (Vol. I, cap. VII).

nue of death, in its dual informal and extra-official manifestation: —«extra-judicial execution», we would say now, in terms of International Human Rights Law —, and formal, official death, by the mandate of the Law and the decision of the court or tribunal. We crossed the best part of the 19th c., a tragic century, applying punishments to keep the peace of the land and the city. It appeared that death would respond to the *governance* of the new Republic, agitated on occasions by imperial abduction.

In the flood of executions were those handed down, in lengthy paragraphs, by rigorous tribunals, as well as those solved by vindictive crowds. These deaths fell on people who were different and on dissenting voices, intolerable authorities, assailants, labourers. We recall the story of Edmundo Valadés, in which villagers requested permission from the authorities to punish the mayor, who is «a bad person»; «he causes a lot of strife and we can't abide him». Permission granted, the spokesperson from the village answered: «Thank you very much for your agreement, because as nobody pays us a blind bit of notice, the municipal president of San Juan de las Manzanas has been dead since yesterday»¹⁶. A variation of Fuenteovejuna in San Juan.

This was a key matter in the deliberations of the grand Constitutional Congress of 1856-1857, an assembly of distinguished liberals, cultivated men at the forefront of their time. One might suppose that the fathers of the Constitution would have regarded the death penalty with aversion and would have voted for its abolition. It was not so: in general, they saw it with aversion; but they also looked at the panorama of a country in rebellion with aversion. It was necessary to abolish the death penalty, but to do so would require an effective successor, an instrument of redemption that would respect the life of the accused and guarantee life in society. The Congress stated that the remedy, would be found, in the penitentiary system. The deaths would cease when that was in place.

Article 23 of the Constitution of 57 foresaw with great caution and discrete hopes that the penitentiary system would be established «as swiftly as possible». But no small time would pass by before the vitalistic expectations would be fulfilled. At the height of the *Porfiriato*, the work of prison reform began, for which many had waited because of the promise of the Constitutional Congress and of civilization. The latter, however, was in no rush to satisfy the good intentions of the former. On April 2, 1891, President Porfirio Díaz inaugurated the new prison in Puebla, a city that had been the scene of his military glory. And the civil government, faithful to the provisions of the Constitution, put an end on that same date to capital punishment¹⁷.

The dictator directed his «eulogies to the public authorities that, in a solemn Municipal Edict, had declared the abolishment of the hateful death sentence in the

16 «La muerte tiene permiso», in MONSIVÁIS, C. (selection and presentation), *Lo fugitivo permanece. 20 cuentos mexicanos*, Ed. Cal y Arena, 2nd. ed., 2nd. reprint., Mexico, 2002, pp. 51 and ff.

17 Cfr. my notes on these facts in GARCÍA RAMÍREZ, S.: *Los personajes del cautiverio. Prisioneros, prisioneros y custodios*, Ed. Porrúa, 2nd. ed., Mexico, 2002, p. 117.

State», said the *Periódico Oficial* [Official Bulletin] of the day. A good dispatch from the dictator, a contemporary of the 1857 Congress, although it was not as good when he opened the penitentiary of the Federal District. No abolishment of the barbarous punishment in the Federation and in the District and in Federal territories. Perhaps it would be wise to keep it in hand, prudently placed aside. However, the strategy failed to slow down the national movement in 1910. Not even was it curbed by the «twin sister» of the ultimate punishment, applied with great ease during the dictatorship of Porfirio Díaz: the «Ley Fuga» [Law of Flight] ¹⁸.

Neither did the Revolutionary Congress of 1916-1917 move to suppress the death penalty, although it took a step down that road, reserving it for extremely serious offences, but without ordering its use in such cases. The authority to use it was left in the hands of ordinary legislators. In 1929, the criminal legislation of José Almaraz abolished capital punishment –without the approval of Almaraz himself– within the boundaries of the Federation, the District and the Territories. So it was that the formal decline of the ultimate punishment began, a prolonged decline that would take many years, up until the new century. The last State to abolish capital punishment was Sonora, in the heat of the penitentiary «romanticism» of the day that camped out in the 19th c.

Today, at last, there is no death penalty in Mexican criminal legislation. On 29 June, 2005, the decree was published in the *Diario Oficial de la Federación* that repealed the death penalty in the regulation that constituted its ultimate outpost: article 142 of the Code of Military Justice. The abolitionist current prospered in the Senate of the Republic, which started the abolition of punitive death through the reform of articles 14 and 22 of the Political Constitution of the United States of Mexico, published on June 29, 2005. It may be added that Mexico, in this same plausible defeat, signed the Protocol for the Abolition of the Death Penalty, in the framework of the American Convention on Human Rights¹⁹. Death expired in the legal Mexican order, after a struggle lasting centuries –a titanic struggle between both sides–, as it has reached its end in the majority –the virtual majority– of all Latin American countries²⁰.

18 Cfr. TURNER, J.K.: México bárbaro, Ed. Porrúa, 3rd. ed., México, 1992, p. 122.

19 The protocol was signed on 8 June 1990. Mexico adhered on 28 June and deposited its instrument of adherence on 20 June, without formulating reservations with regard to the death penalty for very serious offences in wartime.

20 It remains in the legislation of Guatemala, although it is not applied, on account of various pronouncements by the Inter-American Court of Human Rights. Cfr. García Ramírez, S.: «La pena de muerte en la Convención Americana sobre Derechos Humanos y en la jurisprudencia de la Corte Interamericana», in Boletín Mexicano de Derecho Comparado, Instituto de Investigaciones Jurídicas, UNAM, Mexico, año XXXVIII, num. 114, September – December 2005, pp. 1021 and ff.

I will leave here my notes on capital punishment, which have only served the stated purpose of establishing my solidarity with the work that extols Don Francisco de Goya, a narrator of life in the midst of death. It is besides natural that an artist endowed with sensitivity and profundity would have laboriously toured places of fear and desolation, and would therefore have offered testimony of death applied in response to the desire for freedom and calls for justice.

As much has certainly taken place in a broad sector of Mexican plastic arts, where there are also astounding chronicles, in the style of each school, each period, each vocation, about the crimes and the misery that creates or exploits them: oppression and injustice, forces of order and tribunals; prisons and firing squad walls; those hanged, and executed by the firing squad, suicides and vengeance. Informal and extra-official death appear in the drawings, as an instrument of oppression, and official death, avowed and documented. The precious illustrations of José Guadalupe Posada, that report in their -lucid, wounding and precise- way an era that passed alongside the verges of worn down tracks, its direction heading towards the future.

In these etchings, death is the primordial actor -or actress: painful or festive death, «skull and cross bones», in the Mexican style, so detailed and radical, and death by the power of a decision, in advance of the jurisdiction to prepare the way or that fulfils the order of a tribunal: noose or firing squad. Of course, there are other testimonies in Mexican muralism –the genuine fruit of a profound revolution, from the roots– housed in public buildings that gave shelter to what in other times was called a «monumental and heroic art», called to exercise a mission of evangelization in a civil spirit. Muralism that denounced and that dreamt, with promises that we, the visitors of galleries, stairways, libraries, and museums parading dreams and sleepless moments, gaze at, in enthrallment.

It is necessary to praise –and I have set myself the task in these paragraphs – the splendid calling and the disinterested labours of the Academic Network against the Death Penalty, which continues to raise the formidable flag that someday, now close by, will wave in all the squares of the world. We have come for that. We are moving towards that. We are doing so along the same road and for the same motives that Gregorio Marañón noted in 1928, and which are reproduced in the frontispiece to the Spanish edition of this militant work: it is necessary to place respect for the lives of others above all else,. And with the same certainty that Mayor Zaragoza voices: this is not a matter of criminal policy, but a question of human rights.

HUMAN CRUELTY IN LITERATURE

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A «DIFFERENT NECESSITY»: LITERATURE AS «ATTENTION» TO THE UNIQUENESS OF HUMAN BEINGS AND THEIR STORIES

Having been invited to speak at the preparatory conference of the *World Congress against death penalty*, I feel encouraged to address the theme that I will now discuss –«Human cruelty in literature»– with a somewhat narrower meaning than the one which could be evoked by the term «cruelty», thereby suggesting at least two limitations of scope.

Firstly, in my talk, I will mostly (or, at least, more directly) consider human cruelty that is inflicted by states, governments or generally public authorities and powers (including social and economic powers) on individuals, whereas the death penalty (apart from metaphorical usages) is usually understood as a punishment meted out by the State, or by the public or at the very least collective powers. Violence and cruelty between single individuals (a topic quite worthily examined in a recently published criminological study in Italy, with plenty of references to pieces of literature and movies)¹, will remain in the background of my talk. Having said that, I am doubtful however about whether the considerations which will emerge

Forti, G. (2014), Human Cruelty in Literature. In Arroyo, L., Schabas, W., Takayama, K., & Muñoz, M. (cords.). *Death Penalty: A Cruel and Inhuman Punishment* (pp. 99-128). Cuenca: Ediciones de la Universidad de Castilla-La Mancha.

1 CERETTI, A./NATALI, L.: *Cosmologie violente. Percorsi di vite criminali*, Cortina, Milano, 2009.

from my speech could possibly be applied to that very special kind of state cruelty, which involves genocides and violence against entire peoples: a theme—the literary portrayal of mass murders, first and foremost the Holocaust (or, better said, the Shoah)—deserving in itself one full conference at the very least,² as we did recently in my University dealing with crimes against humanity and especially with the works of Primo Levi and their implications for law and justice³. Such a peculiarity depends perhaps upon the distinctive feature of e.g. literature on the Shoah, namely that it poses the problem of separating history, literature and mythology, the three archetype narratives, and thus requires a discussion that «no longer resides comfortably within the old disciplines» and «demands a new conscious, emotional, and methodological reappraisal»⁴.

Secondly I will stick to a rather delimited meaning of the term «cruelty». One of the current usages of this concept is «behaviour that causes pain or suffering to others, especially deliberately»⁵. However in the Italian Criminal Code, we have an aggravating circumstance (art.61, n.4) for crimes committed using cruelty against persons («... *l'aver agito con crudeltà verso le persone*»)⁶, where «cruelty» is commonly understood by judges as a deliberate and malicious violence exerted *beyond* what is needed to achieve one's goal.⁷ I think that, besides the subjective idea of «cruelty», it is precisely in this excess of violence—namely in the use of violence beyond that which may be necessary, reasonable or acceptable—where we can find one of the main and most relevant meanings of the concept, on which I intend to focus⁸.

This is also one of the meanings seen in the Eighth Amendment of the American Constitution that forbids «cruel and unusual punishments»⁹ (which was appropri-

2 On the general topic, see SCHWARTZ, Y.: *Holocaust Literature: Myth, History, and Literature* in Brandeis University, International Center for Ethics, Justice and Public Life, *Literary Responses to Mass Violence*, Brandeis University, 2004, pp. 97-107; ROSEN, I.: «Literaried Testimonies: Life Histories of Holocaust Survivors of Austro-Hungarian Origin», *ibi*, pp. 17-34.

3 Conference organised by the «Centro Studi 'Federico Stella» sulla Giustizia penale e la Politica criminale: *Se questo è un uomo. Narrare la resistenza al disumano*, Università Cattolica del Sacro Cuore di Milano, 15th – 16th May 2013.

4 SCHWARTZ, pp. 98, 106.

5 Oxford Advanced Learner's Dictionary, Oxford University Press, Oxford-New York, 2000.

6 Art. 61, n. 4, Codice penale italiano: «l'aver adoperato sevizie, o l'aver agito con crudeltà verso le persone».

7 See among others Corte di Cassazione, sez. I, 88/747; sez. I 08/25276.

8 See *Vocabolario della Lingua Italiana* Zingarelli, Zanichelli, Bologna, 2012, where «cruel» is defined as «something causing affliction, pain, suffering», namely of a person, not feeling compassion or remorse for the sufferings inflicted on other people.

9 As is usually recalled, the four principles to decide whether or not a particular punishment was cruel and unusual were determined by Justice William Brennan, who, in *Furman v. Georgia* (408 U.S. 238 (1972)), wrote that the «essential predicate» is «that a punishment must not by its severity be

ated by the American framers of this rule from the English Declaration of Rights of 1689)¹⁰. Here, I have neither the intention to clamber through the huge pile of jurisprudence on this Amendment¹¹, nor indeed to deepen our understanding of the reasons why both American federal and district courts and the Supreme Court (e.g. in the field of treatment and discipline of prisoners and convicted), «have alternatively extended and circumscribed the conditions deemed humanly tolerable»¹². However, the words the Amendment uses and the different ways they have been understood, besides being quite relevant to the theme of death penalty, offer ample proof of how mobile the boundaries between proportionate and excessive violence are, and thus how sensibilities may differ in our definitions of sheer «cruelty». As Richard Posner puts it, «the clause was added to the Bill of Rights, with little debate or discussion, to mollify people worried that the central government created by the Constitution might imitate the British practice of using criminal punishment to intimidate political opponents». Therefore, «no effort to particularize the prohibition was made», as «particularizing would have been time-consuming and might have sparked debilitating controversy; it is easier to agree on generalities than on particulars. The courts would be there to particularize the prohibition if that became necessary». Posner mentions, as further reason for this vagueness of wording and thus for not better defining the constitutional prohibition, the aim to maintain «its adaptability to social and technological changes - changes in society's conceptions of cruelty, in the frequency of particular punishments, and in the technologically feasible range of methods of punishment»¹³.

degrading to human dignity,» must not be inflicted in a wholly «arbitrary fashion», and must not be «clearly and totally rejected throughout society» or «patently unnecessary». Moreover he remarked: «The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity. They are, therefore, interrelated, and, in most cases, it will be their convergence that will justify the conclusion that a punishment is 'cruel and unusual'. The test, then, will ordinarily be a cumulative one: if a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes».

10 POSNER, R.A.: *Law and Literature*, Third edition, Harvard U.P., Cambridge, Mass.-London, 2009, pp. 300.

11 For a vast overview of the death penalty in United States, see GARLAND, D.: *Peculiar Institution: America's Death Penalty in an Age of Abolition*, Belknap Press, 2010 (see also the Italian translation, *La pena di morte in America*, ed. by A. Ceretti, Il Saggiatore, Milano, 2013).

12 For this judgment, see C. DAYAN, *The Law is a White Dog*, Princeton University Press, Princeton, NJ, 2011, p. 78.

13 POSNER, R.A.: *Law and Literature*, p. 300 f.

This latest remark can easily be taken as a good suggestion for any discussion on «literature and cruelty», as obviously literature is not only strictly involved—as cause and effect thereof—in the «changes in society's conceptions of cruelty», but, more importantly, it often effects a shift in the cultural boundaries. This change is due to the peculiar social and cultural role literature plays as well as its intrinsic nature, which influences (and enhances) the sensibilities, in the first instance of readers, but also of a general public; first and foremost, with regard to what is a «necessary» force or violence to exert against human beings and then, with regard to what can be deemed «cruel» or «not cruel», usual or unusual.

Just while questioning such necessity, I think the literature has played and plays nowadays a quite relevant role in disclosing, denouncing and somewhat digging into the very innermost cultural roots of the death penalty, as well as any other cruel or inhuman¹⁴ punishment inflicted on human beings (and animals too)¹⁵.

If we draw from Aristotle¹⁶ the famous distinction between history and poetry, then it appears that the function of the latter does not lie in relating «what has happened, but what may happen -what is possible according to the law of probability or necessity», while history just «relates what has happened».

I would go on to say that the added value literature can offer, in its constructive dialogue with law and justice, stems properly from this feature of relating «what may happen, what is possible», however, according to its own necessity, which is the necessity of the narrative posture. It is just such a special kind of «necessity» that I would try to evoke in the following paragraphs, drawing upon some stories and novels chosen as paradigmatic of the literary discourse on cruelty.

14 In this respect is quite noteworthy the different wording of the Italian Constitution, which (art. 27.3) bans «any punishment consisting in treatments against the sense of humanity» and of the U.S. Eighth Amendment, forbidding «cruel and unusual punishments», thus somewhat lifting the level of tolerance for behaviours that cause pain or suffering to others.

15 See NUSSBAUM, M.: *Frontiers of Justice. Disability, Nationality, Species Membership*, The Belknap Press, Cambridge, Mass.-London, 2006 (esp. pp.341 ff. of the Italian edition: *Le nuove frontiere della giustizia*, Il Mulino, Bologna, 2007).

16 ARISTOTLE, *The Poetics*, IX (translated By Ingram Bywater, The Clarendon Press, Oxford, First Published 1920). «It is, moreover, evident from what has been said, that it is not the function of the poet to relate what has happened, but what may happen, –what is possible according to the law of probability or necessity. The poet and the historian differ not by writing in verse or in prose. The work of Herodotus might be put into verse, and it would still be a species of history, with meter no less than without it. The true difference is that one relates what has happened, the other what may happen. Poetry, therefore, is a more philosophical and a higher thing than history: for poetry tends to express the universal, history the particular. By the universal, I mean how a person of a certain type will on occasion speak or act, according to the law of probability or necessity; and it is this universality at which poetry aims in the names she attaches to the personages. The particular is – for example–what Alcibiades did or suffered».

As a first hint of such a peculiar «literary necessity», I would quote from a noteworthy lecture held by Susan Sontag (which I mention almost every year in the introductory lecture of the course on «Justice and Literature» we have organized, since 2009, at the Catholic University in Milan)¹⁷.

To tell a story is to say: This is the important story. It is to reduce the spread and simultaneity of everything to something linear, a path. To be a moral human being is to pay, be obliged to pay, certain kinds of attention. When we make moral judgments, we are not just saying that this is better than that. Even more fundamentally, we are saying that this is more important than that. It is to order the overwhelming spread and simultaneity of everything, at the price of ignoring or turning our backs on most of what is happening in the world. The nature of moral judgments depends on our capacity for paying attention—a capacity that, inevitably, has its limits, but whose limits can be stretched¹⁸.

We might say, especially in an epoch like ours, so profoundly driven by expediency, market-oriented and utilitarian attitudes¹⁹, that literature, while paying attention to the uniqueness of every single «human» story, is called to resume one of its original roles, as aptly highlighted by Pierre Bourdieu²⁰: having been created out of the opposition between exchange value and aesthetic value and distinguishing itself from «the field of large-scale cultural production», it gives rise to a kind of cultural capital depending on an «ideology of non-commercial merit similar to that in the sphere of rights». Actually, by the end of the eighteenth century, there has been a «simultaneous emergence of the modern concept of ‘literature’ and the modern concept of ‘rights’ in popular discourse» that «suggests a historical intersection between literature and human rights»²¹.

17 What has been achieved in the first two years (2009-2011) of the course is now published in the book *Giustizia e Letteratura I*, FORTI, G./MAZZUCATO, C./VISCANTI, A. (eds.): Vita e Pensiero, Milano, 2012.

18 SONTAG, S.: *The Truth of Fiction Evokes Our Common Humanity*, (also SONTAG, S.: *At the Same Time. The Novelist and Moral Reasoning*, text of lectures titled «Nadine Gordimer», Capetown and Johannesburg, March 2004, it. ed. Nello stesso tempo: il romanziere e la riflessione morale, in *Nello stesso tempo*, Mondadori, Milano, 2008, p. 186).

19 See SANDEL, M.: *What Money Can't Buy. The Moral Limits of Markets*, Farrar, Straus & Giroux, 2012.

20 BOURDIEU, P.: *The Field of Cultural Production: Essays on Art and Literature*, ed. R. Johnson (Cambridge: Polity Press, 1993), as quoted by STONE PETERS, J.: «Literature», the «Rights of Man», and Narratives of Atrocity: Historical Backgrounds to the Culture of Testimony», in *Yale Journal of Law & the Humanities*, 2013, 17, 2, p. 268.

21 STONE PETERS, «Literature», the «Rights of Man», and Narratives of Atrocity», pp. 257 ff.

On those premises, it is difficult to deny the role literature plays in defining the boundary of what is acceptable violence or even «cruel and unusual punishments», concepts which are strictly linked to the idea and the extent of human rights as well as to the «kind of attention» societies and states are willing to pay to the story of every single human being. From this kind of attention arises the peculiar, somewhat idiosyncratic literary perception as «excess» of certain kind of punishments, made acute at a time when any human rights consciousness is challenged by the «nightmares of penal excess» in societies «obsessed with crime»²².

There are indeed some well-known milestones in the long history of U.S. Supreme Court decisions on punishment and death penalty where judges display this sort of attention, namely the adherence to an idea of necessity as distinct from the sheer legal expediency of law, together with an emotional-sensitive reasoning, aptly quoted as paramount examples of literature with a possible influence on legal discourse.

(i) I will first refer to the case of *Woodson v. North Carolina* [428 U.S. 280 (1976)], where the U.S Supreme Court, following the Court's decision in *Furman v. Georgia* (408 U. S. 238), concluded that a North Carolina law at that time (1976), violated the Eighth and Fourteenth Amendments, because it denied the jury, in cases of first-degree murder, the unbridled discretion to choose whether the convicted defendant should be sentenced to death or life imprisonment and made the death penalty mandatory for that crime.

I would quote a passage of the decision (pp. 303 ff.) which focuses on a particular constitutional shortcoming of the North Carolina statute. This shortcoming was recognized in

its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In *Furman*, members of the Court acknowledged what cannot fairly be denied – that death is a punishment different from all other sanctions in kind, rather than degree. [...] A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of human kind. It treats all persons convicted of a designated

22 «'Excess' and 'obsession', to which is opposed the «Scandinavian exceptionalism». See PRATT, J.: «Scandinavian exceptionalism in an era of penal excess, Part I: The Nature and Roots of Scandinavian Exceptionalism», in *Brit. J. Criminol.* (2008) 48, pp. 119-137.

offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death²³.

It seems to me that this passage is a very good specimen of an ability of the judge to understand the «story» behind the legal case and thus to pay that «kind of attention» which makes up «a moral human being». Aptly the philosopher Martha Nussbaum has quoted from this decision to illustrate the role emotions may play even in law²⁴. The relevance of emotions in law is especially highlighted to mark the distance from the idea of law cherished by utilitarians and rationalist thinkers and thus to share and revive the traditional criticism (the «standard complaint» as Richard Posner defines it)²⁵ against the «law and economics» movement, accused of distorting human reality, of obliterating alternatives, a movement that takes «the inherited cultural rhetoric that to a certain extent is already ethically integrated and subjects it to the disintegrative pressures of radical market theory»²⁶.

While confuting this criticism, even Richard Posner however is compelled to acknowledge that «although the articulation of economic principles in mathematical models is indispensable to analysing complex phenomena and invaluable in forcing economic theorists to make their assumptions explicit, for some economists mathematization has become an end itself». And he thus stigmatizes the «tendency to employ a specialized vocabulary incomprehensible to outsiders», namely that «typical professional deformation illustrated in literary studies by theorists' heavy use of an esoteric and pretentious vocabulary borrowed from European philosophers». Moreover, he recognizes that there is a place for unscientific justice talk in lawyers' arguments and judges' opinions. «The unscientific language of free will in the discourse of criminal law serves the ethical purpose of differentiating criminals from other dangerous things, such as animals and avalanches, and by doing so of discouraging casual invocation of dangerousness as a warrant for harsh punishments. Concepts such as human dignity that are too vague for the economist's scientific purposes to have a function in the language game called law»²⁷.

23 Italics added.

24 NUSSBAUM, M.C.: *Hiding from Humanity. Disgust, Shame and the Law*, Princeton U.P., 2004 (pp. 38 ff. of the Italian edition: *Nascondere l'umanità. Il disgusto, la vergogna, la legge*, Carocci, Roma, 2005).

25 See POSNER, R.A.: *Law and Literature*, p. 379, footnote 82.

26 TEACHOUT, P.R.: «Worlds beyond Theory: Toward an Expression of an Integrative Ethics for Self and Culture», in 83, *Michigan Law Review* 849, 881 (1985) as quoted by POSNER, *Law and Literature*, p. 379 f.

27 POSNER, R.A.: *Law and Literature*, pp. 382, 385.

(ii) The second quote of a U.S. Supreme Court decision (and I am also indebted to Martha Nussbaum and her analysis for this quotation) is drawn from *Hudson vs. Palmer*, 468 U.S. 517 (1984), dealing with the case of an inmate (Mr. Palmer) at a Virginia penal institution, who stated that an officer at the institution had conducted an unreasonable «shakedown» search of his prison locker and cell and had brought a false charge, under prison disciplinary procedures, of destroying state property against him solely to harass him. The Supreme Court rejected the inmate's contention that the destruction of his personal property constituted an unreasonable seizure of that property in violation of the Fourth Amendment²⁸, deeming that the Amendment's proscription against unreasonable searches is inapplicable in a prison cell, as prison officials must be free to seize any articles from cells which, in their view, disserve legitimate institutional interests.

However, the dissenting opinion of Justice Stevens followed a quite different and somewhat «literary» path.

More fundamentally, in its eagerness to adopt a rule consistent with what it believes to be wise penal administration, the Court overlooks the purpose of a written Constitution and its Bill of Rights. That purpose, of course, is to ensure that certain principles will not be sacrificed to expediency; these are enshrined as principles of fundamental law beyond the reach of governmental officials or legislative majorities. The Fourth Amendment is part of that fundamental law; it represents a value judgment that unjustified search and seizure so greatly threatens individual liberty that it must be forever condemned as a matter of constitutional principle. 34 [468 U.S. 517, 557] The courts, of course, have a special obligation to protect the rights of prisoners. Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a «discrete and insular minority». In this case, the destruction of Palmer's property was a seizure; the Judiciary has a constitutional duty to determine whether it was justified. The Court's conclusive presumption that all conduct by prison guards is reasonable is supported by nothing more than its idiosyncratic view of the imperatives of prison administration – a view not shared by prison administrators themselves. Such a justification is nothing less than a decision to sacrifice constitutional principle to the Court's own assessment of administrative expediency. More than a decade ago I wrote: «[T]he view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every

28 The Fourth Amendment: «The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized».

individual. [...] *By telling prisoners that no aspect of their individuality, from a photo of a child to a letter from a wife, is entitled to constitutional protection, the Court breaks with the ethical tradition that I had thought was enshrined forever in our jurisprudence*²⁹.

According to Martha Nussbaum³⁰, the dissenting opinion of Justice Stevens evokes a form of literature in the imagination that can move the readers: the ability to imagine the meaning that modest things can assume for a human being-albeit restricted within the walls of a prison-even to support and to enhance the expectation of being able to live a better life after the term of imprisonment. And he draws from the single case of this individual a general, universal perspective regarding all prisoners and their feelings. It is precisely through the description of such modest things and their meaning for that inmate, that the reader of this «literary» description is induced to perceive how unjustified and disproportionate the course of action followed by the prison officers really is.

CRUELTY AS FREEZING OF THE FLOW OF HUMAN STORIES AND IMPOSITION THEREON OF A SINGLE NARRATIVE

The limitation of scope I've tried to achieve so far, still leaves us with an enormous literary landscape to explore and to analyse, as violence «has long been part of our literary tradition»³¹. Every year, when together with my research group we plan our course on «Justice and Literature» («Giustizia e letteratura»), we deeply regret the time constraints which compel us to discard a plethora of proposals flowing to us from various sources, so great is the ocean of novels, stories, poetries not only somewhat dealing with justice and law, but also offering extraordinary insights into the principal legal issues, and both the scholarly and the professional perspectives.

As an Italian professor, I could bring many examples of cruelty in classical Italian Literature. Suffice it to mention great masterpieces such as Dante's *Divine Comedy*, *Decameron* by Giovanni Boccaccio, or *The Prince* by Niccolò Machiavelli (which is not only a political science and philosophical essay, but a literary work of art as well)³², where the depiction of a full gamut of private and public cruelties could be easily collected. But I would rather deal with a few literary masterpieces

29 Italics added.

30 See NUSSBAUM, M.C.: *Poetic Justice: The Literary Imagination and Public Life*, Boston, Beacon Press, 1995 (pp. 147-152 of the Italian edition: *Giustizia poetica. Immaginazione letteraria e vita civile*, Mimesis, Milano-Udine, 2012).

31 BROWN, S.E./ESBENSEN, F.A./GEIS, G.: *Criminology*, 5th edition, Matthew Bender & C., 2004, p. 462.

32 N. Machiavelli devotes an entire chapter of his *Prince* to cruelty, namely the Ch. XVII, «Concerning cruelty and clemency, and whether it is better to be loved than feared».

which may be deemed paradigmatic or that are, at least, frequently referred to in many contemporary studies and courses on «law and literature».

I would in particular pay attention to a few exemplary narratives which, although perhaps rather arbitrarily chosen, will serve the purpose of illustrating, not so much how literature directly describes the death penalty or other extreme punishments (and we really do have a plethora of such descriptions)³³, but how it especially helps focus our attention on the cultural roots thereof: namely, on the very basic human motivations that drive people and institutions to take their «necessity» for granted and thus remove the very idea of cruelty from their perspective, surrounding it with an aura of «normality».

As an aid to steer my talk to this focal point on the literary landscape, I would refer at first to that paradigmatic excess of violence and unjustified use of force beyond what is required to achieve the goal, which were and still are³⁴ lynchings: collective violence acting as graphic reactions to acts «perceived as crimes of lese majesty, challenges to the social order and the racial code upon which that order depended»³⁵: «lynchers acted in ways that proclaimed the sovereign power of ‘the people’ acting directly on their own behalf, avenging their victimized kin, upholding white honour, and demonstrating their collective strength». Inherent in this

33 The list would be overlong. Suffice it to mention, in contemporary literature, the classic masterpiece by Truman Capote, *In Cold Blood* (1966) which, although dealing mainly with the multiple homicide, leads the reader to continuously think of the punishment awaiting the two offenders. In classic 19th century literature, reference to Victor Hugo's *Les Misérables* can not be overlooked, where the nature of death penalty is explicitly discussed, in a passage which mirrors Hugo's standpoint against the death penalty, as expressed in several other fictional and non-fictional writings (*Le dernier jour d'un condamné*, 1829; *Notre-Dame de Paris*, 1831; *Claude Gueux*, 1834; *Affaire Tapner*, 1854; etc.) and speeches (*La peine de mort est le signe spécial et éternel de la barbarie*, *Discours à l'Assemblée constituante*, 15 septembre 1848; etc.). Aptly, the aversion to the death penalty in *Les Misérables* is described as arising from the sight of the device used to execute it: «In fact, when the scaffold is there, all erected and prepared, it has something about it which produces hallucination. One may feel a certain indifference to the death penalty, one may refrain from pronouncing upon it, from saying yes or no, so long as one has not seen a guillotine with one's own eyes: but if one encounters one of them, the shock is violent; one is forced to decide, and to take part for or against. Some admire it, like de Maistre; others execrate it, like Beccaria.

The guillotine is the concretion of the law; it is called vindicte; it is not neutral, and it does not permit you to remain neutral. He who sees it shivers with the most mysterious of shivers. All social problems erect their interrogation point around this chopping-knife. The scaffold is a vision. The scaffold is not a piece of carpentry; the scaffold is not a machine; the scaffold is not an inert bit of mechanism constructed of wood, iron and cords» (*Les Misérables*, Chapter IV: Works corresponding to words, translation by Isabel F. Hapgood).

34 Recently the press has reported and condemned a upsurge of lynchings in Bolivia. See *The New York Times*, June 7, 2013; *L'Osservatore romano*, June 12, 2013, p. 7.

35 GARLAND, D.: «Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America», in *Law & Society Review*, Vol. 39, No. 4 (Dec., 2005), pp. 793-833.

«excesses of punishment», was the aim of conveying «a surplus of meaning, articulating the destruction of a dangerous black offender onto the different dimensions of local culture and social structure» and stemming from different drives, such as the intent to achieve dishonouring and degradation, expressive justice, cultural instruction, purification, terror and racial control, sovereignty and private police power, scapegoating, solidarity, power play, sexual violence, etc.

Among such different drives, I deem the «control of meaning» particularly relevant for my analysis on cruelty in literature, especially «in a setting that was highly contested and deeply conflictual». Quoting from David Garland, «absolutism in punishment is also marked by the absence of doubt», as lynchings, «allowed a single narrative, a single truth, to be publicly proclaimed». In contrast to legal proceedings, where evidence and adversarial systems of justice «could disrupt stereotypes, dispute facts, and humanize defendants, public lynchings allowed the untrammelled projection of pure racial stereotypes and stark moral contrasts», thus abetting the eagerness of mass mobs to attest to «a single structure of meaning, unopposed and unquestioned» and lending itself to become «a device for the avoidance of doubt (including self-doubt) and the suppression of dissent»³⁶.

The mechanism of lynchings represents in an extreme way some features inherent in the very origin of law. Although legal students are accustomed to learning that law arises from facts (*ex facto ius oritur*), we could also say, as pertinently remarked by François Ost, that law arises out of a bundle of possible stories and narrations thereof (*ex fabula ius oritur*). In the full gamut of possible stories, from the fictional world, law chooses one single story, assuming it as paradigmatic, and «normalizing» it within a legal rule and a sanction. However, after having established such rules, a mirror game between rule and facts, norm and fiction, is set in motion, generating the most complex intricacies.³⁷ It happens thus that societies, groups and states may be sometimes tempted and even lured by fear or other feelings to reduce the lively gamut of «possible» stories even further to a single and «official» one, a rather deadly one (in either a metaphorical or a real sense), to be solemnly (and sometimes cruelly) «inscribed» on the bodies and/or souls of «condemned» individuals.

Pertinent to this topic, seems to me a well-known short story by Franz Kafka, In the Penal Colony (*Die Strafkolonie*) which offers a sharp metaphor of the dynamics and cultural drives of excessive violence. It is mostly a description of the use of a torture and execution device that carves the sentence of the condemned prisoner on

36 GARLAND, D.: Penal Excess, p. 822.

37 FOST, F.: Raconter la loi. Aux sources de l'imagination juridique, Odile Jacob, Paris, 2004 (p. 25 of the Italian Translation: Mosé, Eschilo, Sofocle. All'origine dell'immaginario giuridico, Il Mulino, Bologna, 2007).

his skin, before letting him die. There are three main characters in the story: the Officer, the Traveller and the Condemned Man.

«He was indeed,» said the Officer, nodding his head with a fixed and thoughtful expression. Then he looked at his hands, examining them. They didn't seem to him clean enough to handle the diagrams. So he went to the bucket and washed them again. Then he pulled out a small leather folder and said, «Our sentence does not sound severe. The law which a condemned man has violated is inscribed on his body with the harrow. This Condemned Man, for example,» and the Officer pointed to the man, «will have inscribed on his body, 'Honour your superiors.'»[...] The Traveller wanted to raise various questions, but after looking at the Condemned Man he merely asked, «Does he know his sentence?» «No,» said the Officer. He wished to get on with his explanation right away, but the Traveller interrupted him: «He doesn't know his own sentence?» «No,» said the Officer once more. He then paused for a moment, as if he was asking the Traveller for a more detailed reason for his question, and said, «It would be useless to give him that information. He experiences it on his own body.» The Traveller really wanted to keep quiet at this point, but he felt how the Condemned Man was gazing at him—he seemed to be asking whether he could approve of the process the Officer had described. So the Traveller, who had up to this point been leaning back, bent forward again and kept up his questions, «But does he nonetheless have some general idea that he's been condemned?» «Not that either,» said the Officer, and he smiled at the traveller, as if he was still waiting for some strange revelations from him. «No?» said the Traveller, wiping his forehead, «then does the man also not yet know how his defence was received?» «He has had no opportunity to defend himself,» said the Officer and looked away, as if he was talking to himself and wished not to embarrass the Traveller with an explanation of matters so self-evident to him. «But he must have had a chance to defend himself,» said the Traveller and stood up from his chair³⁸.

One of the most interesting interpretations of this story has aptly seen therein the description of how the understanding of the law may depend mainly or even fully upon the spectacle of its sanction, graphically and cruelly inflicted. And especially how people can feel relieved by this performance, being released from the pangs of doubts and uncertainty, from guilt and remorse which bite into their flesh and soul as long as they are not aware of its existence or not able to grasp its content.³⁹ This is a great teaching for every legal scholar or practitioner, often confronted with the prevailing and thus unbalanced role played in judicial decisions by sanctions to the

38 Translation by Ian Johnston, of Malaspina University College, Nanalmo, BC, Canada (see www.kafka.org/index.php?aid=167).

39 BAIONI, G.: *Kafka. Romanzo e parabola*, Feltrinelli, Milano, 1997, p. 145, fn 1.

detriment of those rules, of which such sanctions should be mere servants, to the effect that the difficult persuasive power of precepts is sacrificed for the easy cruelty – or at least afflictive impact – of punishments⁴⁰.

We could also say that in Kafka's story, a mechanism of «normalization» is performed, stemming from a common need for certainty and precision and from the attempt of people and institutions to satisfy it. Not only do they satisfy it through legal rules, which the lawmakers have made clear and easy to understand, but through much more subtle dynamics, which draw certainty from the sanction itself: the more this is harsh and graphic, the more it is supposed to convey the feeling (better: the delusion) that rules exist and are well established and clear. Having among their main driving forces just that «avoidance of doubt (including self-doubt)» and attesting to «a single structure of meaning, unopposed and unquestioned», as epitomized in the sad story of modern lynchings, practices where cruelty in general, and cruelty by State and public power in particular, reveal themselves in their full light. The more unassuming and indirect these practices are, the more they pose serious threats to human rights, especially at times where values, legal and moral, are controversial and unclear.

At present, one of the most recurrent features of the «law and literature» movement is an explicit or implicit criticism of this sort of violence, inherent not only in punishment or criminal law, but somewhat so in an essential nature of law itself. Such is its nature that it could be the impending «original violence», as analysed in the famous Critique of violence by Walter Benjamin⁴¹, where it is argued, as aptly remarked,⁴² that it is not possible to separate violence from law, that all law is latent violence and «therefore [it] is law itself which decides what violence is justifiable for what ends». If, as was equally well remarked, «the power established by law-making violence threatens the lawbreaker with law-preserving violence», we have «a mythical cycle bound to endless repetition» analogous to the «violent

40 This danger threatening every judicial decision and strictly connected to the so-called hindsight bias, has been amply discussed in Italy in various areas of criminal law and especially after the enactment of the law that since 2001 punishes legal entities as such, albeit with a kind of penal administrative sanction whose real nature is the object of debate (d.lgs. n. 231/2001). Especially on this issue, namely on the need to find the right balance between «precept» and «sanctions» of laws, see our essay: FORTI, G.: «Uno sguardo ai «piani nobili» del d.lgs.n. 231/2001», in Riv.it.dir.proc.pen., 2012, 4, especially pp. 1277 ff.

41 See BENJAMIN, W.: «Zur Kritik der Gewalt», in BENJAMIN, Gesammelte Schriften, Bd. II.1. Frankfurt/M. 1977, pp. 179-203; it. edition. Per la critica della violenza, in NOVUS, A.: Saggi e frammenti, Einaudi, Torino, 1976, pp. 5-28. On Benjamin work, see DESIDERI, F./BALDI, M.: Benjamin, Carocci, Roma, 2010, pp. 61-68; DERRIDA, J.: Force de loi (it. trans.: Forza di legge, Bollati Boringhieri, Torino, 2003, pp. 86 ff. especially pp. 93 ff.).

42 AUERBACH, A.: Remarks on Walter Benjamin's Critique of Violence, paper presented to the seminar After 1968, led by Katja Diefenbach, Jan van Eyck Academie, 2007.

tautology» described in Kafka's 'The penal colony'. Thus, we could perhaps say that literary discourse is a way to come to terms with the apparently insoluble (in real social or legal life) problem of a conflict-resolution, which does not itself require the use of violence: the «attention» to the uniqueness of human destinies and stories that, through literature, «we are obliged to pay», gives rise to that domain of «pure means» without ends that Benjamin invoked to break the mythical machine which is powered just by the logic of ends⁴³.

We can easily understand how the target of such literary criticism of violence (which reproduces its sheer cruelty) may suffer the same instability as the terms of the Eighth Amendment, because literary discourse is compelled to confront the quite variable level of acceptable violence that a State may exert against citizens, depending on national and international legal rules, but also on prevailing sensibilities and ethos. To the point that not only the death penalty, but detention, especially in conditions deemed inhuman by current sensibilities, may be called into question or even harshly criticized. Quite aptly, ample discussion of the meaning of the Eighth Amendment has included a mention of «the evolving standards of decency that mark the progress of a maturing society»⁴⁴.

There is a second meaning—which I deem equally paradigmatic for my current discussion of cruelty in literature—that we can draw from Kafka's 'Penal Colony'. It refers to what has been aptly defined as the function of the juridical process «as a familiarizing ritual (a series of verbal statements, theatrical performances, and writing activities) which somehow [...] tries to render the unintelligible or the

43 AUERBACH, Remarks on Walter Benjamin's Critique of Violence.

44 The words of Chief Justice Earl Warren in *Trop v. Dulles*, 356 U.S. 86 (1958). Subsequently, the Court looked at societal developments, as well as at its own independent judgment, in determining what those «evolving standards of decency» are. The Court then applied those standards not only to say which punishments are inherently cruel, but also to say which punishments that are not inherently cruel are nevertheless cruelly disproportionate to the offense in question. An example of the «evolving standards» idea can be seen in *Jackson v. Bishop* (8th Cir., 1968), an Eighth Circuit decision outlawing corporal punishment in the Arkansas prison system. The «evolving standards» test is not without its scholarly critics. For example, Professor John Stinneford asserts that the «evolving standards» test misinterprets the Eighth Amendment: The Framers of the Bill of Rights understood the word «unusual» to mean «contrary to long usage». Recognition of the word's original meaning would precisely invert the «evolving standards of decency» test, suggesting that the Court compare challenged punishments with the longstanding principles and precedents of the common law, rather than shifting and nebulous notions of «societal consensus» and contemporary «standards of decency». On the other hand, Dennis Baker has asserted that the evolving standards of decency test accords with the moral purpose of the Eighth Amendment and the Framers' intent that the right be used to prevent citizens being subjected to all forms of unjust and disproportionate punishments. As Professor John Bessler points out, «An Essay on Crimes and Punishments», written by Cesare Beccaria in the 1760s, advocated proportionate punishments. Many of the Founding Fathers, including Thomas Jefferson and James Madison, read Beccaria's treatise and were influenced by it.

threatening both intelligible and tame»⁴⁵. Just as «the law which a condemned man has violated is inscribed on his body with the harrow», this body (and soul), quite disquieting and mysterious (as the body of a man made a stranger and an enemy by the violence of law) is rendered tame through the act of becoming nothing other than a vehicle of the rule, being dispossessed of the many features which make up a human being. As an object of inscription of the law, this act serves the aim of reading and writing the unknown threat, thereby giving it an «ordered existence», putting it «into control» and thus providing «psychological stability» as well as sustaining a kind of epistemology, just as in the first legal actions of Columbus, when he discovered the new World, «a simultaneous action of erasure and inscription» has been noted⁴⁶. The Other is thus «made subject within discourse»⁴⁷ however through a «violent appropriation» which evokes the «Foucauldian genealogy of modern law» and the view that «law is a scriptural embodiment of the king's body and hence of the king's will»⁴⁸. An inscription which exempts itself from the need to be understandable to the persons subjected to it, actually treated as mere bodies, as flesh used to express the sovereign's will.

It seems to me that the cruelty inherent in such a mechanism and, what is more, the forces moving it, are magisterially portrayed in one of the etchings of the great painter Francisco de Goya – the main artistic mentor to our conference – which has been aptly mentioned by Juan Bordes: *No se puede saber porque* (Nobody knows why)⁴⁹.

The result of such «violent appropriation» also consists in the emptying of meaning (aside from the filling of negative meaning) of «any potential symbolic systems of the other»⁵⁰, in the setting in place of «a symbolic order which will, in time, be installed inexorably as the general social order», thus radically realigning, repositioning and making such systems virtually invisible, rather than erasing them⁵¹.

Another literary sample of such a mechanism, where cruelty is however more latent and less graphic than in Kafka's novella (albeit quite similar in its essential meanings) and where the «violent appropriation» is achieved through cultural

45 BOIRE, G.: «Symbolic Violence: Law, Literature, Interpretation—An after word», in ARIEL, January-April 2004, Vol. 35, No. 1-2, pp.231-45.

46 BOIRE, G.: Symbolic Violence, p. 231.

47 BOIRE, G.: Symbolic Violence, p. 234, here quoting from other sources.

48 BOIRE, G.: Symbolic Violence, p. 240 f., with reference to FOUCAULT, M.: Discipline and Punish: The Birth of the Prison, Trans. Alan Sheridan. New York: Vintage, 1979, (Italian trans., Sorvegliare e punire. Nascita della prigione, Einaudi, Torino, 1995).

49 See also the book produced just for the Conference: Francisco de Goya. *Contra la crueldad de la pena de muerte*, ed. by BORDES CABALERO, J./ARROYO ZAPATERO, L., 2013, p. 70.

50 BOIRE, G.: Symbolic Violence, p. 234.

51 BOIRE, G.: Symbolic Violence, p. 244.

means, not directly by the State apparatus, can be drawn from the book *The Invisible Man*, by Ralph Ellison⁵².

The novel, a dramatic description of one nameless black man's position in the «white» world, begins with what is deemed the most memorable opening paragraphs in modern American fiction⁵³, whose content anticipates quite a lot of the whole plot, but, I think, also provides a revealing insight into the relationship between literature and cruelty which I am discussing here.

I am an invisible man. No, I am not a spook like those who haunted Edgar Allan Poe; nor am I one of your Hollywood-movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids – and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination – indeed, everything and anything except me.

Not casually, one of the two epigraphs of the book is taken from Hermann Melville's *Benito Cereno*: a short novel where cruelty finds a notable and explicit place, centred as it is on racial conflict and slavery, that one critic has defined «as the most salient of works: a tale of desperate men in the grip of a vengeful fury that those whom they hate cannot begin to understand»⁵⁴.

«You are saved, "cried Captain Delano, more and more astonished and pained; «you are saved: what has cast such a shadow upon you?»

As we well know, although after the American Civil War, slavery was abolished and black men were freed, as the *Invisible Man* relates, legal freedom did not prevent the persisting social invisibility of black people. The «concept of blackness» persisted in ensuring racial subordination and law itself concurred, «engineering the stigma that ordained deprivation»,⁵⁵ just like the «mythical machine» of legal violence set in motion on all those extraneous people, subordinated and expelled from society, who, «once outside the valuable discriminations of personhood» see

52 See NUSSBAUM, M.: *Cultivating Humanity* (pp. 101 ff. of the Italian edition).

53 See MITGANG, H.: «'Invisible Man', as Vivid Today as in 1952», *New York Times*, March 1, 1982.

54 DELBANCO, A.: *Melville: His World and Work*, Knopf, New York, 2005. See also ROSENGARTEN, A.: *Citizenship and Invisibility: Ralph Ellison's Invisible Man, Race, and Democratic Prospects*, The University of Chicago Divinity School, 9 April 2010.

55 DAYAN, C.: *The Law is a White Dog*, pp. 52-53.

their «claims become inconsequential». Melville, in particular, was «obsessed with the making and unmaking of human materials, the metamorphoses that straddled the chasm between persons and things, as well as humans and animals»⁵⁶. Accordingly (and pertinently to our Conference), one of his most famous novels, *Billy Budd* (a novel which finds a paramount consideration within the «law and literature» movement)⁵⁷, was composed in the years (1886 to 1891), when «national and international attention was focused on the climax of a century-long battle over capital punishment unfolding in the very place where Melville was living – New York State» and it has been said to derive in part from the American movement against capital punishment.⁵⁸ As has been said, this work «dramatizes each of the crucial arguments and concepts of that movement», indeed the essence of the issue, also of the contemporaneous debate, «structures the story»: «Which offenses, if any, should carry the death penalty? Does capital punishment serve as a deterrent to killing or as an exemplary model for killing? What are the effects of public executions? Is hanging an appropriate method of execution in a civilized society? Is an impulsive act of killing by an individual more-or less-reprehensible than the apparently calmly reasoned act of judicial killing? Is capital punishment essentially a manifestation of the power of the state? A ritual sacrifice? An instrument of class oppression? A key component of the culture of militarism?»⁵⁹.

CRUELTY PERCEIVED THROUGH «ATTENTION»: THE CRITICISM OF THE LEGALISTIC SACRIFICE OF HUMANITY TO EXPEDIENCY INHERENT IN THE LITERARY DISCOURSE

According to the Justice Stevens' dissenting opinion in *Hudson vs. Palmer* quoted previously, the Court had overlooked the purpose of a written Constitution and its Bill of Rights, to «ensure that certain principles will not be sacrificed to expediency», thus forgetting the prescriptions of Fourth Amendment and allowing that kind of cruelty a prisoner officer can exert with his vexatious behaviour against a prison inmate.

56 DAYAN, C.: *The Law is a White Dog*, pp. 115-116, who quotes Benito Cereno, where at the end Captain Delano prods Don Benito to snap out of his gloom: «But the past is passed; why moralize upon it? Forget it. See, you bright sun has forgotten it all, and the blue sea, and the blue sky; these have turned over new leaves. Benito answers: «Because they have no memory, because they are not human».

57 See POSNER, R.A.: *Law and Literature*, pp. 211-227 with further references. To *Billy Budd* was devoted the first number of the *Cardozo Studies in Law and Literature* (Spring 1989), being deemed by Richard H. Weisberg (in his Preface therein) as «the text that has come to 'mean' Law and Literature.»

58 FRANKLIN, H.B.: *Billy Budd and Capital Punishment: A Tale of Three Centuries in American Literature*, 345 (June 1997).

59 FRANKLIN, H.B.: *Billy Budd and Capital Punishment*.

I think that a second and subtler level of cruelty that literature does not depict as such, but helps us to perceive or even to materialize in the minds of leaders, is what emerges from narratives where, aptly, exploitation or expediency suppress the respect and dignity that is due to human beings. I mean that in ordinary (including professional) life, we would not be able to judge some acts and situations or even perceive them as cruel or simply violent, if, embedded in the literary narrative, they evoked its characters and thus aroused our emotions and human sympathy, even allowing us to see ourselves as possibly, realistically involved in similar predicaments. I would like to dub it as a «literary enhanced perception of cruelty», namely a cruelty we are able to grasp only thanks to the sympathy and compassion that literature is capable of arousing in the readership.

There are entire libraries of novels and stories which epitomize such literary denunciation and the capacity of literature to enhance our perception of unscrupulous acts, making «facts» appear as sheer cruelty that actually do not in themselves reveal this quality, or at the very least concealing them under various guises, including what have been aptly named «definitional stops», in reference to common forms of «abuse of definition»⁶⁰. One vivid instance of such a technique, which makes use of expertise and professionalism to mask harsh realities of human deprivation, is precisely the identification of prisoners' confinement in isolation as an «administrative precaution» and not as «disciplinary» or «punitive» exercises, thus exempting such treatments from an evaluation based on the Fourth Amendment⁶¹. Human cruelty finds its place within literature precisely while its verbal concealments are unmasked, not only because they become embedded in the narrative texture, but also because good literature has the ability to name things and facts correctly, to use «le mot juste» («the right word»), as the great French writer Gustave Flaubert recommended for achieving quality in literary art.

Melville's *Billy Budd* itself displays (and implicitly criticizes) «the most disturbing feature of utilitarianism – that it countenances the deliberate sacrifice of an

60 A «definitional stop», according to an expression coined by HART, H.L.A., is a form of 'abuse of definition', epitomized by the argument of Justice Clarence Thomas that conditions of imprisonment are not part of the definition of punishment, as he has claimed that «Judges and juries—but not jailers—impose punishment». See ZAIBERT, L.: «Up rootedness as (Cruel and Unusual) Punishment», in *New Criminal Law Review: An International and Interdisciplinary Journal*, Vol. 11, No. 3 (Summer 2008), pp. 384-408. Another example of abuse of definition is the exclusion of deportation is from the concern of criminal law, in spite of the real punitive nature of some practices of the United States immigration law.

61 DAYAN, C.: *The Law is a White Dog*, p. 75.

innocent person for the sake of the general good».⁶² This sacrifice takes the shape of capital punishment, to be inflicted upon Billy Budd, according to Captain Vere, on the basis of an argument quite similar to the deterrent effect that is in general assumed (and never really proven) to accompany this punishment. , But in a «far more cynical» way: Vere sustains his argument on the assumption that Billy's hanging before the crew «will intimidate them and reinforce the 'arbitrary discipline exerted over them by the officers, while not hanging him would encourage mutiny». An argument that could sound, even to contemporary readers, «so obviously specious and illogical as to appear virtually a parody of the usual defence of capital punishment for the sake of deterrence»⁶³.

Gentleman [Lieutenant in other versions], were that clearly lawful for us under the circumstances, consider the consequences of such clemency. The people (meaning the ship's company) „have native sense; most of them are familiar with our naval usage and tradition; and how would they take it? Even could you explain to them—which our official position forbids--they, long moulded by arbitrary discipline, have not that kind of intelligent responsiveness that might qualify them to comprehend and discriminate. No, to the people foretop man's deed, however it be worded in the announcement, will be plain homicide committed in a flagrant act of mutiny. What penalty for that should follow, they know. But it does not follow. Why? They will ruminate. You know what sailors are. Will they revert to the recent outbreak at the Nore? Ay. They know the well-founded alarm-- the panic it struck throughout England. Your clement sentence they would account pusillanimous. They would think that we flinch, that we are afraid of them--afraid of practicing a lawful rigor singularly demanded at this juncture, lest it should provoke new troubles. What shame to us such a conjecture on their part, and how deadly to discipline⁶⁴.

Among the further examples of attitudes that literature would have us perceive as «cruel» or at least particularly callous, enhancing our empathy toward fictional

62 See, together with other references therein, POSNER, R.A.: *Law and Literature*, p. 219: «But Vere [...] argues policy, as a lawyer would say - the danger of mutiny. This is the most unsettling part of Vere's argument, even though it is unrelated to legalism or resentment - indeed; it is the rejection of legalism in favour of expedience. When Vere asks, 'How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so?', he puts the reader in mind of the most disturbing feature of utilitarianism - that it countenances the deliberate sacrifice of an innocent person for the sake of the general good. Utilitarianism treats the whole society as a single organism whose welfare is to be maximized, which makes it as natural to kill one person for the greater good of society as it would be to remove a cancerous organ».

63 FRANKLIN, H.B.: *Billy Budd and Capital Punishment*.

64 MELVILLE, H.: *Billy Budd*, Chapter 22.

characters sacrificed for the sake of expedience and utilitarianism, I could mention Charles Dickens' novel *Hard Times*, so accurately analysed by Martha Nussbaum⁶⁵. The main character is Thomas Gradgrind.

A man of realities A man of realities. A man of facts and calculations. A man who proceeds upon the principle that two and two are four, and nothing over, and who is not to be talked into allowing for anything over. Thomas Gradgrind, sir—peremptorily Thomas—Thomas Gradgrind. With a rule and a pair of scales, and the multiplication table always in his pocket, sir, ready to weigh and measure any parcel of human nature, and tell you exactly what it comes to. It is a mere question of figures, a case of simple arithmetic⁶⁶.

There are (at least) two vivid passages in the novel which epitomize the contrast to what the U.S. Supreme Court stated in *Woodson v. North Carolina* as the requirement of law, namely to treat all persons (including the convicted ones) «as uniquely individual human beings», not «as members of a faceless, undifferentiated mass», sheer botanical or animal specimens of generic phenomena.

She passed it away with a slight motion of her hand, and concentrating her attention upon him again, said, 'Father, I have often thought that life is very short.'—This was so distinctly one of his subjects that he interposed. 'It is short, no doubt, my dear. Still, the average duration of human life is proved to have increased of late years. The calculations of various life assurance and annuity offices, among other figures which cannot go wrong, have established the fact.'

'I speak of my own life, father.'
'O indeed? Still,' said Mr. Gradgrind, 'I need not point out to you, Louisa, that it is governed by the laws which govern lives in the aggregate.'⁶⁷
'I want to hear of you, mother; not of myself.'
'You want to hear of me, my dear? That's something new, I am sure, when anybody wants to hear of me. Not at all well, Louisa. Very faint and giddy.'
'Are you in pain, dear mother?'

'I think there's a pain somewhere in the room,' said Mrs. Gradgrind, 'but I couldn't positively say that I have got it.'

65 NUSSBAUM, M.: *Poetic Justice: The Literary Imagination and Public Life* (pp. 49 ff. of the Italian ed.).

66 DICKENS, C.: *Hard Times*, Chapman & Hall, London, 1905: Chapter II, «Murdering the innocents».

67 DICKENS, C.: *Hard Times*, Chapter XV, «Father and daughter», italics added.

After this strange speech, she lay silent for some time. Louisa, holding her hand, could feel no pulse; but kissing it, could see a slight thin thread of life in fluttering motion⁶⁸.

Reading these two passages, and especially the «strange speech» of a human being dispossessed of the awareness of her own feelings, just while the narrative is presenting her story (according to Susan Sontag's remark) as «the important story», one is made aware of a kind of cruelty in the – otherwise quite ordinary and unassuming – attitudes and behaviours of the main character. Thus, the magic storytelling machine of literature can make us perceive as cruel, what in ordinary life could pass by almost unnoticed or appear to be rational and proportionate use of force, just because we are induced, by reading, «to pay certain kinds of attention».

Actually in *Furman v. Georgia*, among Justice Brennan's «principles by which we may determine whether a particular punishment is 'cruel and unusual'», the «essential predicate» has been deemed «that a punishment must not by its severity be degrading to human dignity». We could thus say that while sensitized, through literature, to cruelty and to the harm it brings, we are also made aware of a richer and subtler substance of human dignity. Such «literarily enhanced» awareness makes us understand dignity as due respect for the uniqueness of every human story and especially as strictly intertwined with the idea that no end may be imposed on such story, whose further development can always display something new, some unexpected twist, something that may (according to Aristotle's view of literature) always happen. This leaves only a very tiny time and space to the necessity of violence, namely to any rash break-up or arbitrary torsion imposed on this open and ever unfolding living thread.

Similarly in the *Philoktetes*⁶⁹ by Sophokles, the reader, feeling sympathy with the story of the main character, bitten by a sacred serpent, suffering from a cruel festering wound, crying awfully, can perceive in Odysseus' neglect of Philoktetes-far from «normal» insensitivity to the lives of others, dictated by single-minded pursuit of power-a sheer act of cruelty toward the «poor» hero's cruel sufferings. In contrast to Odysseus, the chorus of the warriors – just like Justice Stevens in his dissenting opinion – is able to imagine such sufferings sympathetically, thus conveying to the public an emotional understanding: the capability to take pity on him.

68 DICKENS, C.: *Hard Times*, Chapter IX, «Hearing the last of it», italics added.

69 See also NUSSBAUM, M.: *Cultivating Humanity* (pp. 99 ff. of the Italian ed.).

PHILOKTETES

I beg you by your father, by your dear mother,
by all you have ever loved at home:
do not leave me here
to live on in suffering, now that you have seen me,
and heard what others have said about me.
I am not important to you.
Think of me anyway.
I know that I will be a troublesome cargo for you,
but accept that.
To you and your noble kind, to be cruel
is shameful; to be decent, honourable.
If you leave me, it will make for an awful story.
But if you take me, you'll have the best of men's praise,
that is, if I live to see Oeta's fields.

CHORUS

Take pity on him, lord.
He has told us of many horrible torments.
May such troubles fall on none of my friends.
If, lord, you hate the terrible Atreids,
put their treatment of him to your advantage.
I would carry him, as he has asked,
away with you on your swift-running ship,
fleeing the gods' cruel punishment⁷⁰.

As recently remarked, it's just from the literary depiction of the spiritual sufferings of Philoktetes that we are induced to perceive the misery of the human condition and thus feel compassion toward him.⁷¹

Undeniably, what is expected from literature is an enrichment of our imagination, namely of the ability to share empathically other people's sufferings and thus, at least in part delivered from a pure matter-off act proneness, to think of possible developments in their life.

Another great depiction of cruelty, of racial cruelty, is the Merchant of Venice by William Shakespeare, undoubtedly one of the most explored and discussed works in the field of «Law and Literature»⁷². But cruelty appears in many different forms in

70 SOPHOKLES, *Philoktetes*. Bold added.

71 PRETE, A.: *Compassione. Storia di un sentimento*, Bollati Boringhieri, Torino, 2013, pp. 41 ff.

72 For a magisterial analysis of this drama, together with Shakespeare's *Othello*, especially in the «racial» cruelties described therein, see CATTANEO, A.: «Shakespeare alla sbarra. Giustizia e processi

the drama, not the least in Antonio's «legalisms».⁷³ Thus, the mirror game between literature and law shows here a further facet: law allows us to perceive the cruelty just in an expedient use of law while reading the story of Shylock and, through the literary enhancement of our imaginative powers, to feel empathy for his final predicament.

The same machine is at work in *The Trial* (*Der Prozess*), another very famous Kafka novel and a great hit in «Law and Literature» readings. The novel does not depict cruelty explicitly, except perhaps in the last scene, when the main character, Joseph K., is killed.

But the hands of one of the gentleman were laid on K.'s throat, while the other pushed the knife deep into his heart and twisted it there, twice. As his eyesight failed, K. saw the two gentlemen cheek by cheek, close in front of his face, watching the result. «Like a dog!» he said, as if the shame of it should outlive him.

It is cruelty rather that is perceived by readers in the painstaking attempt of Joseph K. to defend himself against a mysterious accusation and judicature («Someone must have been telling lies about Josef K., he knew he had done nothing wrong but, one morning, he was arrested»), and especially for his pains of being restricted along the whole novel just in this role of defendant, thus being deprived of the attention to his full personality that every human being, in the uniqueness of his story, would deserve. He is treated as a «member of a faceless, undifferentiated mass to be subjected to the blind infliction» of a trial just before the infliction of any actual punishment takes place.

Quoting from Garland's remarks on public lynchings, we could also say that «a single narrative, a single truth» is imposed upon Joseph K., «a single structure of meaning, unopposed and unquestioned», which ignores the poetic story of a life which should always be a «may happen» a «what is possible», not to be reduced within deterministic and quantitative boundaries of «what has happened». It is just the contrary of the «what is possible» which gives room to «compassionate or mitigating factors stemming from the diverse frailties of human kind», as mentioned in *Woodson v. North Carolina*.

nel «Mercante di Venezia» e in «Otello», in *Giustizia e Letteratura* I, pp. 4-31; D'ALESSANDRO, F.: «La discriminazione su base razziale nell'opera di Shakespeare: giudizi e pregiudizi ancora attuali», in *Giustizia e Letteratura* I, pp. 32-41.

73 WEISBERG, R.H.: «Antonio's Legalistic Cruelty: Interdisciplinarity and The Merchant of Venice», in *MYSTADES* (ed.): *Undisciplining Literature*, N.Y.: Peter Lang, 1999, 180, repr. From *College literature*, 25, 1 (1998), pp. 12 – 20, esp. p. 19.

As I ventured to say in a seminar on Kafka we organised in April at the Catholic University of Milan⁷⁴, the description of Joseph K.'s desperate judicial defence should be read in conjunction with Franz Kafka's own life and especially his everlasting and strenuous attempt to defend himself against the father. Kafka does not limit himself to acting out this personal and familiar struggle in the novel, but submits this struggle to an inescapable verdict of guilty, showing the cruelty, not so much in the trial, but in the condition of a man who has been deprived of his own story, of a narrative open to the many «what may happen» and, «what is possible» which make up a human life worth living and preserved in its dignity.

Indeed I think that some inspiration for such a reading of *The Trial* comes from a posthumous fragment usually entitled *Every human is peculiar* (*Jeder Mensch ist eigentümlich*), where Kafka tells the deep anguish as a child of his parents not allowing him the pleasure of night-time reading. This prohibition was lived by Kafka just as a denial of what was peculiar in him. We see here a kind of cruelty against a child which seems paradigmatic of what I've said of cruelty in general, namely that is an expression of the will to deny to an individual «what is possible» to him, and to break the unique and infinite narrative of one's life and personality which makes up his peculiarity. All the more so, as the child Franz Kafka felt himself crushed by the monstrous disproportion between this futile prohibition and the marvellous, infinite perspectives that reading and narrations were disclosing before him.

Indeed all was infinite or disappeared so much in the indefinite that could be compared to infinite: thus time was infinite, then it could not be too late; my eyesight was infinite, then I could not spoil it; even the night was infinite⁷⁵.

It seems that the act of writing for Franz Kafka will mostly become a compensation for that denial of his peculiarity and deliberately consisted, just like *The Trial*, in the narration of unidirectional lives (*The Metamorphosis*, *America*, *The Castle*, etc.), of people crushed by the constraint of a single path, deprived of the turn of the «what may happen», which in the end drains their soul out of them.

74 Università Cattolica di Milano, Ciclo seminariale «Giustizia e Letteratura» (Law and Literature) 2012-13, 11 April 2013, «'Davanti alla Legge'. La Giustizia di Franz Kafka».

75 KAFKA, F.: «Frammenti da quaderni e fogli sparsi», in SCHIAVONI, G. (ed.): *Aforismi e frammenti*, RCS Libri, Milano, 2004, pp. 255-259. For a commentary on this text, CALASSO, R.: *Adelphi*, Milano, 2002, pp. 239-242.

THE ROLE OF LITERATURE IN MORAL AND LEGAL EDUCATION

Literature plays a quite relevant role in politics and law and is an essential resource in the development of the imagination, benefiting human understanding and thus feeding the ability to envisage how things could happen, which constitutes that critical thought desperately needed in any democracy⁷⁶. Actually «learning requires reflection, and reflection requires distance. Fiction may be superior to fact as a means of education precisely because fiction is imaginative or reflective rather than concrete and immediate. We can learn vicariously from reflecting on the fictional experiences of others what we cannot learn directly from events in our own lives»⁷⁷. As aptly remarked, a child begins to acquire moral capacities when he hears and tells himself stories.⁷⁸ All the stories told in the literary works I have mentioned, may be read as a denunciation of the inability of the «interior» eye of people to see human reality, to pay enough attention so that we continue to strive to become moral human beings, as democracy needs individuals endowed with such powers to observe and actually see in other people the common and shared humanity⁷⁹ of their individual, open-ended stories.

Compassion arises whenever we feel our vulnerability and feel that we share such a condition with any other human being,⁸⁰ which is just how it has been expressed in a passage of Woodson v. North Carolina. Cruelty has its roots in the will of cancelling such shared feeling, building up a substitution of a single simple narrative for the open narrative which makes up the life of people and articulates the discourse of human rights.

We can therefore better understand why and how the histories of modern literature and modern rights are so intertwined. As has been said, «to live in literature, or to experience oneself as the bearer of rights [...] was to rediscover one's humanity, apart from the world of commerce and politics». Thus «the language of the 'human' embedded in both 'literature' and 'rights' helped to reinforce this universalist humanism, as well as to distance both domains still further from mechanistic notions of competition in the political, economic, or cultural spheres»⁸¹.

76 NUSSBAUM, M.: *Cultivating Humanity. A Classical Defense of Reform in Liberal Education*, (Italian edition, p. 100), quoting from ARISTOTLE, *Poetica*.

77 ZUCKERT, C.C.H.: «Leadership - Natural and Conventional - in Melville's «Benito Cereno»», in *Interpretation. A Journal of Political Philosophy*, Winter 1998, Volume 26 Number 2, p. 252.

78 NUSSBAUM, M.: *Cultivating Humanity* (p. 103 of the Italian ed.).

79 NUSSBAUM, M.: *Cultivating Humanity* (p. 102 of the Italian ed.).

80 NUSSBAUM, M.: *Cultivating Humanity* (p. 104 of the Italian ed.).

81 As STONE PETERS: «Literature,» the «Rights of Man», remarks (p. 271), «Schiller's Letters on the Aesthetic Education of Man are, arguably, paradigmatic here. For Schiller, precisely because art is disinterested (autonomous from the world of getting and spending), it is the thing that allows one to realize one's humanity-one's connection to a higher and more universal humanity than that of the

Literary works like *Les Misérables* or Uncle Tom's Cabin have been deemed «the central vehicle for the great humanitarian and rights movements of the nineteenth century».⁸² They amply depict cruelty in what I named as the «direct way», not only in the indirect one, by contrast to an idea of human being worthy of dignity and respect and not to be subjected to expediency and calculation. «Humanitarianism was founded in notions of the narrative power of the suffering human body as the basis for moral response The discourse of rights accompanied by the language of moral obligation served as an imperative formulation of the lessons of sympathy that literature taught»⁸³.

The impelling issue to be investigated by legal scholars and professionals in view of the sweet or sour fruits we can pluck nowadays from the recent resurgence of «the humanist paradigm on which literature and rights were modelled through the later eighteenth and nineteenth centuries», after the eclipse effected in the twentieth century by a social engineering paradigm which has devastated human kind with its tyrannies and totalitarianism and is still haunting our lives in the form of financial capitalism.

Our efforts to introduce law students to literary experiences are based on the idea of a strict connection and mutual support between literature on the one hand and the daily–theoretical and practical-work of law professionals, lawmakers, judges and prosecutors on the other. We think that just now literary discourse is a great source of inspiration for several impressive and successful legal achievements, which generally draw on a new (or at least placed outside the mainstream of current or recent politics views) perspective on criminal justice and penal responses.

everyday (commercial) world. Art redeems one from modern means-end utilitarianism, relieving one from the burden of competition and the praxis of life and preserving, in their ideal forms, such things as joy, truth, solidarity, and humanity. 'The citizen who, in everyday life has been reduced to a partial function (means-ends activity) can be discovered in art as 'human being'».

82 STONE PETERS, , «Literature, the Rights of Man», pp. 272 ff.: «Writing in 1772, Benjamin Franklin expressed the idea, referring to the «natural compassion to . . . Fellow-Creatures» that brings «Tears at the Sight of an Object of Charity, who by a bear [sic] Relation of his Circumstances» seems «to demand the Assistance of those about him». «Sympathetic identification was understood to be responsive to images, but still more to stories of suffering, that is, to visual, but still more to narrative stimuli («Relation of ... Circumstances»), the kind of narrative stimuli which eighteenth-century culture produced in abundance: in the autopsy reports that Laqueur describes (unlike their predecessors, expanded into pathos-rendering narrative); in non-fiction narrative accounts of the period; but above all in «literature». That is, humanitarianism was a fundamentally narrative, or literary, ideology: The narratives of suffering central to literature taught one how to be human, and ultimately to rise above the dehumanizing forces of modernity.

83 STONE PETERS, «Literature, the Rights of Man», pp. 272 f., who quotes from T.W. Laqueur («Bodies, Details, and the Humanitarian Narrative», in *The New Cultural History*, ed. Lynn Hunt (Berkeley: U of California P, 1989), pp. 176-204).

As sensibly remarked, in today's truth commissions and tribunals, which mostly have to cope with terrible cruelties, we have, among many other things, a reiteration of the «belief in the rationality of the public sphere», of «the notion that private and individual traumatic experience must be brought into the public light», of «the view that the authentic narrative voice of the victim both allows the victim the relief of being heard and creates moral demands, which, speaking to the natural compassion of the audience, bring about a kind of societal conversion»⁸⁴. As in the eighteenth century, narrative flowing from victims' voices is seen as the «foundation for responsive action and social union that can transcend the alienation of modernity and return us to the human».

We can also agree that «the proliferation of truth commissions and tribunals is a response to a moment of crisis for the law, produced by a sense of law's groundlessness, its radical contingency, especially when translated into the sphere of the super-state, with its never-fully legitimized authority». And that in such a context, «the victim is responsible for providing an unquestionable ground for the exercise of legal power», which «is located in the performance of suffering», serving «to authenticate a set of newly-created and still-somewhat tenuous legal claims in the domain of human rights», and that through the human voice: «the voice of the victim offers a kind of truth that documentary evidence, reports, legal determinations cannot provide»⁸⁵.

These expectations can actually be quite problematic. As stated, the current «epidemic of storytelling» may be one that «merely offers hysterical repression a ritual expression», «a way of focusing on our little fingers at the expense of the global corpus (with its dreary impersonality), or at the expense of getting down to the complicated technical business of saving lives. It may be a sentimental and eviscerated displacement of other kinds of work: the rebuilding of cities and farms; the fixing of broken bodies; the sad policing of still unquiet violence»⁸⁶.

However, we should not forget that listening to storytelling on cruelty, especially those narrated through the voices of victims, is just the starting point of a difficult journey, which entails great responsibility for everybody and for institutions involved in such listening, requiring the will to contribute to policies and sensibilities, to a real understanding and coping with the conditions from which such cruelties have arisen or could arise in future. Thus, the heart of the matter is the way such an «epidemic of storytelling», especially on cruelty, can actually manage to steer criminal justice and criminal policies, as well as attitudes within the judicature, and

84 STONE PETERS, «Literature, the Rights of Man», pp. 275 f.

85 STONE PETERS, «Literature, the Rights of Man», p. 276.

86 STONE PETERS, «Literature,» the «Rights of Man», pp. 275-283.

not simply reduce itself to «merely offering hysterical repression a ritual expression» or «a way of focusing on our little fingers at the expense of the global corpus».

A very tangible way through which literature and (good) storytelling can find their way in criminal justice is restorative justice and thus mainly the mediated dialogue between offender and victim⁸⁷.

This vast area of studies, practices and experiences is strictly intertwined with literature, even in the Aristotelian meaning, as it is able to transform both the static historical frame of the committed crime, of cruelty inflicted and the equally static penal response to it, into a dynamic project, into a new story to be lived and told, into a new path open to «what may happen» and «what is possible», to be followed, possibly together, by offender and victim⁸⁸. Restorative justice seems to reproduce

87 Especially drawing on the already quite conspicuous Italian experiences in the field, I'd limit my references to some essential works: CERETTI, A.: «Mediazione penale e giustizia. In-contrare una norma», in AA.VV.: Studi in ricordo di Giandomenico Pisapia, Giuffrè, Milano, 2000; CERETTI, A./DI CIO, F.: «Giustizia riparativa e mediazione penale a Milano. Un'indagine quantitativa e qualitativa», in *Rassegna penitenziaria e criminologica*, 2003, VI(3), pp. 99 ff.; CERETTI, A./MAZZUCATO, C.: «Mediazione reo/vittima: le 'istruzioni per l'uso' del Consiglio d'Europa. Un commento alle Guidelines for a Better Implementation of the Existing Recommendation concerning Mediation in Penal Matters», in *Nuove Esperienze di Giustizia minorile*, Ministero della Giustizia – Dipartimento per la Giustizia minorile, 2008, n. 1, pp. 201 ff. (also available here: http://www.giustiziaminorile.it/rsi/publicazioni/2008_01.asp); MANNOZZI, G.: *La giustizia senza spada: uno studio comparato su giustizia riparativa e mediazione penale*, Giuffrè, Milano, 2003; MAZZUCATO, C.: «Giustizia esemplare. Interlocuzione con il precetto penale e spunti di politica criminale», in BERTOLINO, M./FORTI, G./EUSEBI, L. (eds.): Studi in onore di Mario Romano, Jovene, Napoli, 2011, pp. 407 ff.; id., «Appunti per una teoria 'dignitosa' del diritto penale a partire dalla Restorative Justice», in *Dignità e diritto: prospettive interdisciplinari*, Quaderni del Dipartimento di Scienze Giuridiche -Università Cattolica del Sacro Cuore (sede di Piacenza) n. 2/2010, Libellula, Tricase, 2010, pp. 99 ff. (also: http://dipartimenti.unicatt.it/scienzegiuridiche_dignitadiritto_ebook.pdf); id., «Un umano fare, al posto di un disumano subire. Considerazioni politico-criminali intorno alla giustizia riparativa», in TRECCI, P./CAFIERO, M. (eds.): *Riparazione e giustizia riparativa. Riflessione di servizio sociale nel sistema penale*, Franco Angeli, Milano, 2007, pp. 39 ff.; id., *Un filo rosso unisce mediazione penale e diritti dei bambini. Strategie consensuali e costruttive per la prevenzione dei reati minorili*, UNICEF, Atti del Secondo Incontro Nazionale sulla Giustizia Minorile, Bari 28-29 April 2005, in *Mediaries*, 2006, pp. 267 ff.; id., *Consenso alle norme e prevenzione dei reati. Studi sul sistema sanzionatorio penale*, Aracne, Roma, 2005; id., «Mediazione e giustizia riparativa in ambito penale. Fondamenti teorici, implicazioni politico-criminali e profili giuridici», in COSÌ, G./FODDAI EDS, M.A.: *Lo spazio della mediazione*, Giuffrè, Milano, 2003, pp. 151 ff.; id., «L'esperienza dell'Ufficio per la mediazione a Milano», in *La mediazione penale in ambito minorile: applicazioni e prospettive*, Atti del Seminario di studi a cura dell'Ufficio centrale Giustizia Minorile, Franco Angeli, Milano, 1999, pp. 137 ff.; id., «L'universale necessario della pacificazione: le alternative al diritto e al processo», in LOMBARDI VALLAURI, L. (ed.): *Logos dell'essere, logos della norma*, Adriatica, Bari, 1999, pp. 1245 ff.; id., «La mediazione nel sistema penale minorile», in BARBERO AVANZINI, B. (ed.): *Minori, giustizia penale e intervento dei servizi*, Franco Angeli, Milano, 1998, pp. 117 ff.

88 See EUSEBI, L.: «La risposta al reato e il ruolo della vittima», in *Diritto penale e processo*, 5/2013, pp. 527-31.

a meaning which should imbue the full scope of criminal justice and even of law itself⁸⁹, namely the idea of an alliance between society and offender, an alliance that the crime has not broken once and for all, but that the response to the crime should even possibly restore and help flourish, for the benefit of general crime prevention, and thus the protection of society.

Some international acts do not seem particularly promising, with regard to the ability to appreciate and to make good use of restorative justice in conflict resolution and as a viable alternative to traditional «static» punishment. Actually they seem to focus on strictly criminal sanctions as possible responses to crimes and show a somewhat distrustful attitude toward alternative dispute resolution, including restorative justice and possible opportunities for a direct meeting and dialogue between victim and offender.

One of these acts is Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 «establishing minimum standards on the rights, support and protection of victims of crime», which should be transposed into national legislations by 2015. As it aptly points out⁹⁰, under art. 12⁹¹, dealing with restorative justice and thus with an important channel to convey victims' voices and narratives to criminal justice institutions, it is concerned more to «safeguard the victim from secondary and repeat victimisation,» «when providing any restorative justice services», than to recognize the full potentialities of this kind of conflict resolution as an alternative to traditional means of criminal justice. And thus it displays a defensive

89 See the new meaning of law arising from the stories of the Jewish exodus, F. OST, pp. 43 ff.

90 EUSEBI, L.: *La risposta al reato e il ruolo della vittima*, cit., pp. 527-31.

91 Article 12 Right to safeguards in the context of restorative justice services 1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:

(a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time; (b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement; (c) the offender has acknowledged the basic facts of the case;

(d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;

(e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.

rather than a proactive and promotional attitude toward innovative resources to cope with violence and cruelties.

A similar attitude emerges perhaps from the second document I would mention here, namely the Council of Europe Convention on preventing and combating violence against women and domestic violence and especially art. 48 thereof, expressly prohibiting mandatory alternative dispute resolution processes and sentencing⁹².

Although we cannot help agreeing with the ban of any mandatory use of restorative justice or involvement of the victim therein, it is the full framework of the Convention which raises much perplexity as, like the EU Directive, it seems marked by an approach toward restorative justice which seems more defensive and reactive than proactive in identifying and possibly making good use of its many invaluable assets.

92 Article 48 – Prohibition of mandatory alternative dispute resolution processes or sentencing.

1 Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention.

2 Parties shall take the necessary legislative or other measures to ensure that if the payment of a fine is ordered, due account shall be taken of the ability of the perpetrator to assume his or her financial obligations towards the victim.

FRANCISCO DE GOYA: AGAINST THE CRUELTY OF THE PENAL SYSTEM AND THE DEATH PENALTY

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CHANGING TIMES

In 1800, when Francisco de Goya unveiled the splendid portrait of the family of Charles IV before the Spanish Court, the artist had already reached full maturity and, together with the King, had already seen too much, although not everything. It is not at all easy to form an idea of what a King, whom even the ferocious critic Blanco White had described as a good person, would have made of such terrible events beyond his frontiers to which he had been a witness and that had dragged him into war, defeats and a profound social and economic crisis. The first thing was the North-American War of Independence against Great Britain and its own King and the proclamation of a Republican Constitution with civil rights, which in all probability unlocked the destiny of Spanish America. Later, the pronouncement of the États Généraux in 1788, turned into a torrent that swept everything away and provoked the storming of the Bastille, the Declaration of the Rights of Man and of the Citizen, the subjugation of the clergy to civil powers, and the radical separation

Arroyo, L. (2014), Francisco de Goya: Against the Cruelty of the Penal System and the Death Penalty. In Arroyo, L., Schabas, W., Takayama, K., & Muñoz, M. (cords.). *Death Penalty: A Cruel and Inhuman Punishment* (pp. 129-144). Cuenca: Ediciones de la Universidad de Castilla-La Mancha.

of Church and State, the dethronement of his cousin the King of France, and even the public execution of both King and Queen, in 1793. In effect, it is not easy to form an idea of what the establishment on the other side of the Pyrenees might have represented for the ruling classes of Spain at the end of the century, which was a political system that had buried the dominion of the Church and the idea of God and cut off the heads of its temporal representatives on Earth, who up until then had exercised unconditional power of every sort.

Charles IV could not ignore the calls from the other absolute monarchies of Europe to stamp out the revolution, which led him to a general war along the northern and southern boundaries of the Pyrenees; a campaign that, from an initial small-scale victory in Rousillon, turned into a full-blown retreat, because of a shortage of resources to supply the army.

The whole government had been left in the hands of a young officer of the royal guard, whose leadership was questioned from the start by the displaced nobility. Later on, when claiming essential resources for the civil treasury and the war chest, he laid his hands on the assets of the Church and was vilified from the pulpit. But for the meanwhile, Godoy was to turn defeat into a virtue and to make peace with France, which earned him the royal title of Prince of Peace. However, he immediately returned to a war footing against England, continuing the policy of family pacts amongst the Bourbons. Only five years after finishing the portrait of the Royal family, this confrontation led to the loss of the French and Spanish fleets at Trafalgar and with it, an end to dominion over the seas and secure commercial trade with the Americas for that empire over which the sun was yet to set¹.

Almost at the same time, Napoleon culminated the political revolution in France with its social revolution that consecrated his major work, the Civil Code², and he had himself crowned Emperor.

But, as if such sizeable political, military and economic disasters were not enough to occupy the kingdom, an internal political crisis of the first order fell upon the King from the Pyrenees. The Prince of Asturias, his own son, plotted with Napoleon against his father and against Godoy, in the so-called Escorial Conspiracy, when the country was already occupied by the French army, with the reason and the pretext of the war with Portugal. The catastrophe was unleashed and the events

1 A good summary of the portentous accumulation between the end of the century and 1808 may be seen in BARRIOS PINTADO, F.: *España 1808. El gobierno de la Monarquía*. Real Academia de las Historias, Madrid 2008; FONTANA J., *La quiebra de la monarquía absoluta 1814-1820*. Ariel, Barcelona, 1971; RUÍZ TORRES, P.: *Reformismo e Inquisición*. Vol. 5, of *La Historia de España*, Fontana y Villares, Barcelona, 2008. Para Godoy see LA PARRA, M.: *La aventura del poder*, Tusquets, Barcelona, 2002.

2 BADINTER, R.: «Le plus grand bien...». Fayard, Paris, 2004, Spanish version in *Anuario de Derecho Civil* 2004.

unfolded at a distinctly modern vertiginous speed, when Charles IV and Godoy took off for Seville prompted by their fears of falling prisoner to Napoleon, thinking perhaps of following the example of the Kings of Portugal and embarking on the next ship to America. The party of the Prince of Asturias instigated a mutiny among the royal guard in Aranjuez and the people took over the streets, the Palace of Godoy, and captured Godoy himself. To save Godoy and perhaps himself as well, Charles IV abdicated in favour of Ferdinand, who was proclaimed King on 19th March. Immediately, the King's father, mother, and Godoy were called to Bayonne, where Ferdinand was also soon to travel, and in a few days Napoleon forced the son to return the crown to the father, who in turn handed it over to Napoleon, who in no time at all had his brother, Joseph, crowned King of Spain and of the Indies. On the second of May, the people of Madrid prevented the two remaining members of the Royal family from travelling north and revolted against the invaders³. They were immolated in the charge of the Mamluks and after May 2nd came the executions by firing squad of May 3rd, which sparked a long war of independence that would also be a civil war⁴. In other words, with many more disasters than a war.

When Goya illustrated «*Los desastres de la guerra* [The disasters of war]» he was already a mature man, a distinguished painter of Kings, Princes and the whole Court. He was, like his friends, sceptical with regard to the monarchy and liberal with regard to the government and society. His acute deafness had soured his character and during the war, except for the trip to Zaragoza, he became a recluse in his studio in Madrid.

Goya had come to occupy the venerable post of court painter by 1789 and had established a circle of relations in which open and illustrated thought predominated. As well as nobles and bull-fighters, he painted the portraits of politicians and men of letters with whom he had close relations: Juan Meléndez Valdés, Gaspar Melchor de Jovellanos, Juan Antonio Lorente, and Leandro Fernández de Moratín. The last decade of the century was the «*primavera ilustrada*» [enlightened Spring], a time in which many still thought that Godoy could reform the country, all the more so after he had entrusted the government to Jovellanos. One was to fall with the other, but in the meantime, it was precisely in those years that Goya began the works that expressed his critical thought on social and political themes, throughout a large part of the preparation of 'Los Caprichos'⁵.

3 On the whole affair in Bayonne and on the erroneous beliefs of Napoleon regarding an easy solution to the Spanish question, the memoirs of Napoleon are of great interest and their recreation by Max Gallo, Napoleón. vol. III, Laffont, París 1977, p. 218 and ff.

4 ARTOLA, M., La guerra de la Independencia. Espasa – Calpe, Madrid, 2007.

5 BOZAL, V.: Francisco de Goya. Vida y obra. Volume 1. Tf editors, Madrid, 2005, p. 100 and ff.

‘Los Caprichos’ is a work that criticizes and censures customs, superstition in religious life, and the abusive exploitation by the clergy and the Church of the people, especially the peasantry. It mocks alienation and witches carrying people away and those that believed in them, the ignorance of many clerics and professionals, and machismo and the subjection of women⁶. Goya was at that time a witness to at least one execution in the main square of Madrid of the perpetrators of the famous «*crimen del castillo* [crime of the castle]», the scenes of which he represented in small pictures that form part of the collection of the Marquis of Romana. Crime was then, as it is today, front-line news.⁷

His first picture of a garrotting, nevertheless, dates back to an earlier point in time, in 1778; a drawing and etching in which Goya captured the brutal form of death⁸ that he would portray more widely in the «*Los desastres de la guerra* [The disasters of war]», which he started in 1810. The etching probably reflects the executions in Cordoba of a well-known bandit at the time, «*El puñal*», which he may have personally witnessed on his journey from Sanlúcar to Zaragoza, as León Feuchtwanger liked to imagine.⁹

Goya was not an intellectual in the strictest sense of the word, as he did not dedicate himself to study and to reflection on the social and political questions of his time. He is without a doubt though, in the sense of the enlightened artist¹⁰, inspired by the ideas of the Enlightenment that reached from the cultivated social class for which he worked and with which he had relations and on occasions friendship. His work reflects the enlightened ideas on the most relevant questions of his time and on the greatest civilizing treasure of the Enlightenment: its debate and criticism of arbitrary definitions of crimes, the cruelty of punishments and the way justice was meted out by the *Ancienne Régime*. As is well known, everything had been masterfully summed up by a qualified member of the group in Milan led by the brothers Verri, Cesare de Bonesana, Marquis of Beccaria, in their little book «*De los delitos y la penas* [Of crimes and punishments]» published in

6 IGLESIAS, C.: Las mujeres españolas de finales del siglo XVIII. En Goya. La imagen de la mujer, p. 52-83. Museo Nacional del Prado, Madrid, 2002, Edem loc; TOLMISON, J. A.: Imágenes de mujeres en las estampas y dibujos de Goya. pp. 84-101.

7 El crimen del Castillo. Wilson-Bareau J. In MENA MARQUÉS, M. B.: Goya. El capricho y la invención. El Prado Museum, Madrid, 1994, p. 272.

8 McDONALD, M. P., El trazo español en el British Museum. Dibujos del Renacimiento a Goya. Museo Nacional del Prado, Madrid, 2013. p. 204.

9 FEUCHTWANGER, L.: Goya. Edaf, Madrid, 1994.

10 DE MONTEBELLO, P./PÉREZ SÁNCHEZ, A./SCHESTACK, A.: Goya y el espíritu de la Ilustración. Museo del Prado, Madrid, 1988. TODOROV, T.: Goya. A la sombra de las Luces. Galaxia Gutenberg, Barcelona, 2011.

1764, with no mention of the name of the author to avoid encounters with the Inquisition that would inevitably happen in the end in Italy and in Spain¹¹.

The translation into Spanish was by Juan Antonio de la Casas, perhaps also a face-saving pseudonym. The president and the Royal Council scrutinized it and authorized it, even though they recommended the inclusion of an apology to say that it was nothing more than a «work of philosophy» that made its speculations on the basis of the ideas that inspire humanity, with no disrespect for the law, which the translator complemented with a specific declaration of respect «for the judgement of our holy mother Church». But the argument was to no avail, because the Inquisition issued an edict that prohibited the book *in totum* in Spain, as well as in its original language, because it was «a capricious, dense work and inducing an almost absolute impunity and a work that promotes tolerationism». It even refused to authorize a version that was expurgated of errors: «as the propositions deserving of censure are scattered throughout the book and in second place because to *reprove all capital punishment and to divulge that other sentences are more deserving punishments (...)* is to calumniate against the conduct of God, who established it so in the old Testament of which He is the Author». Moreover, because the system of entering into pacts and the right to punish corresponds to the provisions established by the laws of Parliament «it [the translation] is directed at making the Sovereigns absolutely dependent on the authority of their vassals. Finally, «because of the satirical tone with which it speaks of the procedures of the Holy Office, even though *it is not named*»¹². All in all, better than anyone else, the Grand Inquisitor tells us more about the work of Beccaria and the thoughts of the members of the Academy of History and Royal Council; in other words, it is the majority *opinio iuris* of that time.

This was the intellectual backdrop to Goya's life: it should be the laws and not the reasoning of Sovereigns and Judges that establish crimes and punishments, they should be proportional and free from unnecessary cruelty, the punishments should affect only those that commit the crimes and not their families, torture should have no place in criminal proceedings, as well as secret accusations and presumptions of guilt. And some thought, like Beccaria, about the death penalty that it should be reserved for very exceptional cases of serious peril to the motherland and others that are only applied for the most serious offences and in such a way and manner that they exclude

11 PISANI, M.: Cesare Beccaria, *Index Librorum Prohibitorum*, Edizioni Scintifiche Italiane, Rome, 2013, a summary in Eguzkilore (25), San Sebastián, 2011, p. 136 and ff. Translation by Jose Luis de La Cuesta; CALAMANDREI, P./IBÁÑEZ, A.P./RANCIONI, G.: Cesare Beccaria. *De los delitos y de las penas*. Trotta, Madrid, 2011.

12 See text and study of TORIO LÓPEZ, A.: Beccaria y la Inquisición española. In *Anuario de Derecho penal y Ciencias Penales*, Madrid, 1971, P. 391 and ff., and also in the presentation of TOMÁS Y VALIENTE that is cited later on.

unnecessary suffering and torture. All of this is masterfully presented by Francisco Tomás y Valiente in his *Derecho penal de la Monarquía absoluta* [Criminal Law under absolute monarchy] from 1969, as well as in the presentation of the edition of the booklet by Beccaria on the Treatise on crime and punishment of the Marquis¹³.

The opinion of the Inquisitor-censor of the work of Beccaria established the dogma: it was not considered appropriate to reduce or to limit regal power but, if it were, in addition, a matter of condemning the death penalty, it was blasphemy. Following the same logic, this should not only be dealt with by its inclusion on the list of prohibited books but by death, as the ayatollahs claim today. Everybody, even the reformers, awaited the admonition of the Holy Office. In addition, the trial and conviction of such a key figure as Pablo de Olavide, in 1775, was at the forefront of everybody's mind¹⁴.

Manuel de Lardizábal, a committed and indefatigable reformer of the criminal system, made it clear in his well-known work, *Discurso sobre las penas* [Discourse on punishment], of 1782, that «The supreme powers have a legitimate right to impose capital punishment, provided it is convenient and necessary for the good of the Republic; and that effectively being so in some cases, it would neither be fair, nor advisable to proscribe it from the legislation; although humanity, reason and the well-being of society require that it be used with the greatest possible circumspection» adding that, «a true maxim very much in accordance with punishments is that there should always be a preference for those punishments that, while causing enough horror to serve as a lesson in those that see them executed, should as far as possible be the least cruel for the person that suffers them, because the purpose of punishments, as has been said, is not to torment, but to admonish. For that reason, I think that there should be a preference with regard to capital punishments, when they are necessarily to be imposed, for those that are used among us at present, to the exclusion of all others, which are the garrote, the gallows and the harquebus for soldiers, in which the aforementioned circumstances concur»¹⁵. In 1806, the criminologist, Marcos Gutiérrez,¹⁶ in his *Práctica criminal de España* [Criminal Practice in Spain] also accepted the continuance of capital punishment, but «it should be

13 TOMÁS Y VALIENTE, F.: *Derecho penal de la Monarquía absoluta*. Tecnos, Madrid, 1992 and in *Obras Completas*, I, p. 187 and ff., TOMÁS Y VALIENTE, F.: Presentation of the *Tratado de los delitos y de las penas*. Ministerio de Justicia. Ministerio de Cultura y Biblioteca Nacional. Madrid, 1993.

14 See MARCHENA, J.: *El tiempo ilustrado de Pablo de Olavide: vida, obra y sueños de un americano en la España del S. XVIII*, Alfar, Sevilla, 2001.

15 See in the edition with a preliminary study by RIVACOBÁ, M./ARARTEKO, V., 2001, vid. cap. V, 2 n° 23.

16 GUTIÉRREZ, M.: *Práctica criminal de España*, Madrid, 1806, p. 88 and ff. of the *Discurso sobre los delitos y las penas* contained in vol. III.

used with the greatest circumspection and without spilling human blood, but with the most stringent economy», so, then, «far away from us forever the wheels, the burning furnaces, the pots of boiling oil, molten lead, drawing and quartering men alive, pulling away pieces of human flesh with tongs, sulphur shirts and, in a word, those slow tortures invented to torment the unfaithful prisoners for a long time».¹⁷

The three points are well noted in the work of Goya, which at that time concerned him most: the Inquisition, cruelty when exacting punishments and capital punishment.

INQUISITION

The principal problem for the enlightened thinker was precisely the Inquisition. The Inquisition garrotted free thought and, more so still, the freedom to publish. What would the situation be like, for one of the highest-placed magistrates of the Holy Office, after being asked what should happen to the institution, to recommend its radical suppression in very strong terms. Its author, Juan Antonio Llorente, was an intimate friend of Goya and his destiny as ill-fated as all the «Francophiles». As an excuse for them all, it should be said that they could have little faith in the father or in the son following the behaviour of the King, the Queen and the Prince of Asturias, especially after the aforementioned string of coup-de-états and vaudeville that had taken place from the Escorial conspiracy to the mutiny of Aranjuez and the hand-over of the crown to Napoleon in Bayonne. Llorente explained things thus: «I accepted thinking I was contributing something for the good of my motherland, and with no doubts over the permanence of the new dynasty... the battle of Baylen... (was) the cause that would divide Spain over whether it was possible or not to liberate Spanish territory from French dominion. I had the ill-fortune to believe most certainly that it would not, because there were not the forces in Spain to resist those of France. In consequence, I framed the idea that if the Nation took an active part, it would do so to see its villages destroyed, houses plundered... I thought that the motherland would be happy making a virtue out of necessity, as Fernando did, and bade us do»¹⁸.

Goya gave account of all this in drawings and etchings, especially in drawings contained in Album C, or Images Madrid, or the Inquisition Album, especially in the group that has been called prisoners tortured and convicted by the Inquisition. By tradition, the Inquisition dedicated itself to the purification of ideas and beliefs, of Jews and heterodox Christians. *Por linaje de hebreos* [For having been born a

17 PRIETO SANCHÍS, L.: La filosofía penal de la Ilustración española. In Libro Homenaje a Marino Barbero Santos. Vol. I. Cuenca y Salamanca, 2001, P. 489 and ff.

18 See MORENO DE LAS HERAS, M. in Goya y el espíritu de la Ilustración. p. 271 and f.; ARTOLA, M.: Los afrancesados. Alianza editorial, Madrid, 2008.

Jew] is the most representative (DC88). The Inquisition also concerned itself with proper sexual morality (C 92 *Por querer a una burra* [For Loving a She-Ass] and C 93 *Por casarse con quien quiso* [For marrying whoever he wished]).

Naturally, the Inquisition noted down everything that moved and the repression stifled new ideas (C 94 *Por descubrir el movimiento de la tierra* [For discovering the motion of the Earth]; C 98 *Por liberal* [For being a liberal]; C 109 *Zapata, tu gloria será eterna* [Zapata, your glory will be eternal]):

Especially at the turn of the century, the Inquisition took severe measures against everything that came from France (C 86 *por traer cañutos de Bayona* [for having brought diabolical tales from Bayonne]) and those who expressed themselves freely (C 89 *por mover la lengua de otro modo* [for speaking a foreign tongue]).

The Inquisition was not only a generic, abstract, political and religious fact, but it also affected everybody, especially those who expressed themselves in writing on questions about which the Holy Office was sensitive and those who expressed themselves through painting and other images¹⁹. None other than Goya saw himself facing or was threatened with inquisitorial proceedings. The *Caprichos*, put on sale to the public with great success, caught the attention of the inquisitors and Goya very probably handed over the edition that has not been sold to this day along with the complete set of plates to the King, Charles IV, so that by converting him into Goya's direct patron, his work and he himself would avoid the ire of orthodoxy that appeared to be treading very close to his tail²⁰. Later on, in 1815, he was called to pronounce on both the Clothed and the Naked Maja.

CRUELTY

The cruelty and barbaric nature of the punishments gave cause for general concern. It is enough to recall that a pragmatic King Philip II, in 1734, punished the thief of a single coin with the gallows; that is, if the events took place around about or within 5 leagues of Madrid. It was, moreover, a single and non-commutable punishment, except for minors under 17 years old, who were merely given 200 lashes and 10 years on the galleys²¹. That is the way things were: lashes, mutilations, galleys, exposure to public humiliation, and privation of freedom under the

19 See ESCUDERO, J.A.: *Estudios sobre la inquisición*, Marcial Pons: Madrid 2005; KAMEN, H.: *La Inquisición española, una revisión histórica*, Barcelona : RBA, 2004, a translation from the original in English *The Spanish Inquisition: An Historical Revision*. London and New Haven: Yale University Press (1998).

20 Prudence is never much, as Enrique Gacto Fernández relates in, *El arte vigilado: (acerca de la censura estética de la Inquisición española en el siglo XVIII)* in *Inquisición y censura: el acoso a la inteligencia en España*, 2006, pp. 399 and ff.

21 ARROYO ZAPATERO, L.: *Delitos y penas en el Quijote*, Revista «Añil», Cuadernos de Castilla-La Mancha, 1, 1999, pp. 49 and ff. Available online, and it should not be forgotten that the

cruellest conditions of confinement. Remember that prison as such did not exist until the freedom of the citizen became a reality and, until then, prison was mere detention while awaiting judgment, or torture and punishment in itself. Naturally, Goya also recorded it well in the images of what we could today call prison²². We shudder in numerous drawings at the manacles on the wall and the leg-irons, the shackles behind the back to inflict harsher pain. The extraordinary solitude of the fettered prisoners accompanies the humiliation and the cruelty. In drawing 103, facing the manacled and shackled man, almost certainly with a chain between feet and hands that forced him to crouch when moving, the painter wrote «¡mejor es morir![better to die!]» and, in drawing 112, the same victim can be seen chained up in an unlikely and painful position in which he has to sleep. Goya included three etchings in the exemplary copy of *los Desastres* that he gave as a gift to his friend Cean Bermúdez, with a preparatory drawing that showed the profile of a prisoner in fetters, seated in a painful posture, that became the subject of three pieces: *Tan bárbara la seguridad como el delito* [The custody is as barbarous as the crime], *La seguridad el reo no exige tormento* [The custody of a criminal does not call for torture] and *Si es delincuente que muera presto* [If he is a criminal he should die soon]. Nothing goes further than this criticism of the cruelty of these punishments.²³

With regard to exposure to public humiliation, as well as the humiliations that occurred on processions leading to the execution of capital punishment, which brought with it other penuries «along the usual streets», seated on beasts of burden of three categories, with a conical cap (*coroza*), a penitential garment (*sambenito*) and exposure in public squares and pillories, the drawings of Album C illustrate an exemplary pair of public pillories, where both lines and shading condemn their cruelty. They are represented in drawing 99, *Cayó en la trampa* [He fell in the trap] and 98 *Por liberal* [For being a liberal]. Not even the crippled escaped: C 90, *Por no tener piernas* [For having no legs].

The *Cortes de Cádiz* adopted two laws that describe the censuring of Goya and enlightened thinkers very well. Well before the Constitution, torture was abolished in 1811 and article 303 of the Constitution proclaimed that «Neither torture nor duress will be used».²⁴

galleys had no oarsmen: Prior Cabanillas J. A., *La pena de minas: los forzados de Almadén, 1646-1699*. Universidad de Castilla-la Mancha, Ciudad Real, 2003.

22 See ROLDÁN BARBERO, H.: *Historia de la prisión en España*, Barcelona, PPU, 1988.

23 MATILLA, J.M. in *Goya en tiempos de guerra*. Museo del Prado, Madrid, 2008, p.350-352.

24 TOMÁS Y VALIENTE, M.: *La tortura en España (1973)*, in *Obras completas*, I, p. 759 and ff.

Decree lxi Of 22 April 1811

Abolition of torture and duress, and the prohibition of other afflictive practices. The General and Extraordinary Courts, in absolute unanimity and conformity of all votes, do hereby decree: that torture shall henceforth and forever be abolished in all the dominions of the Spanish Crown, as well as the practices introduced to afflict and to persecute prisoners by what they illegally and abusively called duress: and they prohibit what were known under the names of manacles, muzzles, extraordinary prison cells and others, whatever their names or use may be; no judge, nor tribunal, nor court, whatever its privileges, may order or impose torture, or use the aforementioned forms of duress under its responsibility and the punishment, for the mere fact of ordering it, will be the privation of the judges' office and dignity, whose offence may be prosecuted by civil action, derogating of course any ordinances, Law, Orders and provisions that may have been given and published to the contrary».

After the Constitution, the Courts abolished the punishment of flogging in 1813 throughout the kingdom and for all persons, with special mention of the Indians overseas.

Decree ccxcix Of 8 September 1813

Abolition of the punishment of flogging: use of this and other punishments on the Indians is prohibited.

The General and Extraordinary Courts, convinced of the benefits of abolishing those laws by which degrading punishments are imposed on Spanish citizens, which have been a symbol of bygone barbarity, and a shameful vestige of heathenism, have agreed to decree and do so decree:

I. The punishment of flogging is declared to be abolished throughout the territories of the Spanish Monarchy.

II. In place of the punishment of flogging that which corresponds to the offence for which the prisoner had been convicted will be aggravated; and if it were prison or public works, it will take place in the district of the tribunal, whenever this is possible.

III. The prohibition on flogging is extended to public houses or establishments of correction, educational seminaries and schools».²⁵

In that post-war period, neither the Inquisition nor Ferdinand VII himself cared for Goya. The Constitution and the laws of the Courts abrogated, he was neither praised nor given commissions. The paintings of the 2 and 3 of May were commissioned from Goya by the Regent Cardinal Borbón, uncle to the King, and the Cardinal Archbishop of Toledo, Primate of Spain and patron of obedience to the Constitution, so that the heroic facts of the rebellion and death of the people of

25 FIESTAS, A.: Los delitos políticos, 1808-1936. Cervantes, Salamanca, 1994, p.66-124.

Madrid could be presented before the King on his arrival in Madrid at the Arch of Alcalá, like a soap opera painted on canvas. But, neither the events, nor the paintings, nor the painter, were to the liking of the King ever again. Goya confined in 1819 in Quinta del Sordo, painted the black pictures later on, after taking refuge in the house of friends and with the elegant pretext of taking the waters, he exiled himself in Bordeaux, which like Gibraltar always gave shelter and refuge to liberals.²⁶

The work of the Courts of Cadiz was highly valued by the painter²⁷. The reduction of the power and privileges of the monastic orders initiated by Charles III with the Jesuits and Godoy with his sale of monastic properties, was the social complement to the political revolution. Goya celebrated it with the satirical image of the peasant dragging himself over the fields with a mattock and a priest on his shoulders, beneath which the painter asks: «no sabían lo que llevaban auestas?» [Didn't they know what they were bearing].

And he felt oppressed and desperate when he saw how the reaction ended it all.

GOYA AND THE DEATH PENALTY

The queen of punishments has always been death and even in Goya's day people were executed by steel, fire, and by the most common of them all, the hangman's noose: strangulation by hanging, whether from a tree, or the gallows. However, hanging produces an iniquitous physiology that made many people in our world mediate and that has led to the search for means and methods of execution that are not so cruel and are less of an indignity for the prisoners and their families, as we have seen in the quotations by both Lardizábal and Marcos Gutiérrez. Each country developed its own invention. In France, what Goya called the French punishment, the guillotine, and in Spain and its territories at the time, the garrote²⁸, which because of its greater delicacy was reserved for nobles. Half a century after our story here, the enterprising Americans of the United States sought out the most humane «execution», electrocution, the gas chamber and lethal injections. Modern technologies for an old pharmacopeia.

At the end of the 18th C., death by hanging coexisted in Spain, with or without simultaneous or subsequent quartering, so that with the human remains the message of law and order would extend to the confines of the land where the crimes had been perpetrated. First and foremost the noose, in the form of the gallows or from the

26 BOZAL, V.: Francisco de Goya. Vida y obra. Volumen 1. Tf editores, Madrid, 2005, p. 289 and ff.

27 Goya y la Constitución de 1812. Museo Municipal, Madrid, 1982-83.

28 The primitive form of the garrote may be seen in the Auto de Fé of Pedro de Berruguete (1495) conserved in the Prado Museum and accessible on-line, which dispensed death before purification in the fire.

branches of a tree and the garrotte, together with the harquebus in military executions. In brief, at the start of the new century and except for the military question, at all times expeditious and summary, the noose and the garrotte were rivals for the common people, the one with such a bad reputation always reserved for common folk and the garrotte always for the nobles.²⁹

The Courts could not at the least get over such unjust inequality, nor disregard the brutality of the noose, so much so that they decided to abolish it on 24 January 1812.

Decree cxxviii. Of 24 January 1812

Abolition of the punishment of hanging.

The General and Extraordinary Courts, considering that they have already sanctioned in the political Constitution of the Monarchy, that no punishment may be transferred to the family of whosoever should suffer it; and wishing at the same time that the execution of the criminals should not offer too repugnant a spectacle to humanity and to the generous character of the Spanish nation, are resolved to decree, and by the present do so decree: that henceforth the punishment of hanging be abolished and be replaced by the garrotte for prisoners who are condemned to death.

As much had already been proclaimed by King Joseph, who out of respect for the customs of his adopted motherland and as Dr. Guillotine hated the noose, decided that in any case the garrotte would be used, even to excess and *for a knife or for whatever you might like to think it is*, and always in public.³⁰

Goya could see it in those days of the French occupation, as not a day went by when some rebel or bandit was not executed. He painted it and others told the story³¹. The scaffolds were erected in the Plaza Mayor or the Plaza de la Cebada and one by one or in groups the garrotte did its work. Over time, the executioners started to cover the heads of the prisoners with a cloth, but once the execution had finished, they left the face for all to see. All of this had the greatest publicity and with plentiful public information in gazettes and leaflets.

But, Ferdinand VII eventually returned from the calm retreat of the palaces of Napoleon, where he had sat out the war, without moving so much as a finger while his motherland fought on and sacrificed itself in a fervent desire for his return. On his arrival at Valencia among *Los persas* and others, and despite the sound judgment

29 GARCÍA VALDÉS, C.: No a la pena de muerte. Cuadernos para el diálogo S.A., Madrid, 1975. And also RODRÍGUEZ YAGÜE, C.: (ed.): Clásicos españoles contra la pena capital, Libros Mundi/UCLM: Ciudad Real 2013.

30 And in public executions continued until it was abolished in 1896 by law that had the name of the Deputy, Dr. Ángel Pulido.

31 VEGA J. in Goya y el espíritu de la Ilustración. P. 300-302, with testimony from the time.

of his cousin and Regent, Cardinal Primate of Toledo Don Luis María de Borbón³², he issued the singular decree on 4 May 1814, which not only annulled all the laws passed by the Courts of Cadiz, but even declared it to be «as if such acts had never taken place and were removed from all time»³³.

This meant a return to the earlier situation: Inquisition, noose, and garrotte, always in a cruel and unfair way. Alicia Fiestas documented the terror from 1814 up until 1820 when the Constitution and its laws were reinstated, and the first penal Code of 1822 was approved, which naturally foresaw the death penalty only at the garrotte³⁴, under the terms and conditions that are worth reproducing here:

Art. 31. The prisoner sentenced to death will be notified of his final judgment forty-eight hours before execution.

Art. 32. From the notification of the sentence to the execution, the prisoner will be treated with the greatest commiseration and tenderness; providing him with all spiritual and physical assistance and consolation that he may wish, neither irregularly nor in excess.

Art. 38. The prisoner sentenced to death will be executed in all cases by the garrotte, without torture nor other prior mortifications of the flesh, but in the terms prescribed in this chapter.

Art. 39. The execution will always be in public, between eleven and twelve in the morning; and may not take place on a Sunday nor on feast days, nor on national holidays, nor on days of celebration of all the people. The punishment will be executed on a wooden or masonry platform, painted black, with no adornments or hangings at all in any case, and situated outside the town; but at a place nearby it, and large enough for many spectators.

Art. 40. The prisoner will be led from the prison to supplicate the punishment dressed in a black tunic and black hat, with his hands tied, and on a mule, led on the right by the executioner of justice, provided that he has been sentenced for infamy. If that sentence had been imposed with the death sentence, his head will be left uncovered, and he will be led on a donkey in the aforementioned terms. However, the prisoner condemned to death as a traitor will have his hands tied behind his back, and his head will go uncovered and shorn of all hair. The assassin will wear a white tunic with a noose of esparto grass around the neck. The parricide will likewise wear the same tunic as the assassin, go uncovered and without hair on his head, the hands tied behind the back, and with an iron chain

32 His personality suggests that complicity between the Church and the constitutional regime was not impossible, see RODRÍGUEZ LÓPEZ-BREA, C.: *Don Luis María de Borbón, el cardenal de los liberales (1777-1823)* Toledo, Junta de Comunidades de Castilla-La Mancha, 2002.

33 FONTANA, J.: *La quiebra de la Monarquía absoluta*, Ariel, Barcelona, 1971.

34 FIESTAS LOZA, A.: *Los delitos políticos, 1808-1936*. Ed. Librería Cervantes, Salamanca, 1994. Also relevant for the reaction of 1823 and everything that came after.

around the neck, this being carried at one end by the executioner, who should precede, mounted on a mule. Prisoners who are priests who have not previously been defrocked will always cover their head with a black hat.

Art. 41. In all cases the prisoner will carry a board on his chest and back that announces his crime in large letters, of treason, murder, assassination, recidivist of such and such a crime. Two priests will always accompany him, the scribe, constables in mourning, and the corresponding guard.

Art. 41. When the prisoner leaves the prison. Arriving at the platform, and at every two-hundred and three-hundred steps along the way, the public crier will announce in a loud voice the name of the criminal, the offence for which he had been convicted and the punishment imposed upon him.

Art. 43. So, the greatest order must reign on the streets along the way as well as at the place of execution; whosoever disturbs the peace being punished by immediate arrest, in addition to being summarily disciplined, according to the offence, from two to fifteen days of prison, or with a fine from one to eight *duros*. Those that may shout out or raise their voice, or make any attempt to prevent the execution of justice, will be punished as seditionists, and this provision will always be published in the proclamations.

Art. 44. The prisoner will neither be permitted to speak out, nor to say anything in public, nor to any particular person, but to pray with the ministers of religion who accompany him.

Art. 45. Another board will be placed at the site where the death sentence will be executed, and in the most visible part, which announces the same as the proclamation in large letters.

Art. 46. Having executed the sentence, the corpse will remain exposed to the public at the same site until sunset. It will then be delivered up to relatives or friends, if they were to request so, and if not, it will be buried by provision of the authorities, or it may be handed over for anatomic investigation as agreed. Except for delivery of the corpses of those convicted of treason or parricide, which will be given religious burial in the countryside and at a remote site, away from public cemeteries, without permitting any sign to be placed that would mark the site of its burial.»

The Code of 1822 hardly had time to come into force, as The one-hundred thousand sons of Saint Louis occupied the peninsula and Cadiz had to surrender on the 23 September. The reaction of the Ferdinandistas was more violent than in 1814. This period was known as «the ominous decade»³⁵. Once again noose and garrotte, no different from that dispensed to General Riego, in November, in the Plaza de la

35 LUIS, J.P.: La década ominosa (1823-1833), an unknown stage in the construction of contemporary Europe, in the Journal Ayer, 41, 2001, p. 85 and ff. FONTANA, J., De en medio del tiempo. La segunda restauración española, 1823-1834, Crítica, Barcelona, 2006.

Cebada, in Madrid, until one fine day –which stories of atrocious executions did not reach even the Royal Court itself- the King decreed in a surprising accolade for the birthday of the Queen that «Wishing to conciliate the ultimate and inevitable rigour of justice with humanity and decency in the execution of capital punishment, and so that the torment in which prisoners expiate their crimes should not be a cause of infamy when they are not deserving of it, I have wished to signal with this benefit the pleasing memory of the happy birthday of the Queen, my beloved wife; and I hereby abolish the death penalty by hanging forever in all of my dominions; I order that henceforth execution by the ordinary garrotte be imposed on common people; the garrotte vil shall punish infamous crimes without distinction of class and the noble garrotte will continue, under the laws in force, for those that correspond to noblemen».

But, Goya died in 1828. No longer can he, nor would he enjoy the triumph over ordinary cruelty. His legacy lives on in so many paintings, drawings and etchings, so much so that he may be qualified as the greatest champion fighting against cruel and inhuman punishments and, therefore, against the death penalty.

The history of the death penalty in Spain followed the same destiny as the Motherland, with pain, anomaly and failure – in the words of Santos Juliá³⁶-. In 1936, the death penalty took over all Spaniards and was ferociously practiced until 1945 and with methodic dosages until the end of the Franco regime in 1975. The final execution with the garrotte took place in 1974³⁷.

Everything changes with the «resurrection» of the Constitution – an expression that Francisco de Goya would have liked – in 1978. A firm will for consensus wished to put an end to the «*duelo a garrotazos* [fight with cudgels]» of the Black paintings, fully in force since then and so, among the numerous other beneficial matters, the barbarous custom was abolished and article 15 of the Constitution provided that *Everyone has the right to life and to physical and moral integrity, and may under no circumstances be subjected to torture or to inhuman or degrading punishment or treatment. The death penalty is hereby abolished, except as provided by military criminal law in times of war.*», this latter question was closed with the suppression of capital punishment in military criminal legislation in 1995 and with

36 SANTOS, J.: Anomalía, dolor y fracaso de España. In *Claves de la razón práctica* 66, 1996, pp. 10-21.

37 All these avatars may be followed in GARCÍA VALDÉS, C., *No a la pena de muerte*. Cuadernos para el diálogo S.A., Madrid, 1975, and in the text taken from it that is reproduced in *Clásicos españoles contra la pena capital*, cit. Also in the same place, the study by LANDROVE DÍAZ, G., *La abolición de la pena de muerte en España*; An extraordinary description of the engineering and anthropology of the garrotte may be found in ESLAVA GALÁN, J., *Verdugos y torturadores*, Balbo, Madrid, 1991. From then up until our days see OLIVER OLMO, P., *La pena de muerte en España*. Síntesis, Madrid, 2008.

the ratification in 2010 of protocol number 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms relating to the abolition of the death penalty under all circumstances.

On that date, the Government of Spain sponsored the creation of a group of friendly countries supportive of the universal abolition of the death penalty in times of the Millennium Declaration and the constitution of an International Commission against the death penalty³⁸ which, presided over by Federico Mayor Zaragoza, has since then been conducting intense activities that will without any doubt contribute to converting the proposal supported by the majority of member states of the General Assembly of the United Nations, in its resolution of 1st November 2007, in favour of a universal moratorium on the application of capital punishment, into reality. All of us are therefore called on to attend this appointment in 2015, at which the achievements and shortcomings in the advance of human rights and of the Millennium objectives, established by the United Nations, in 2000, will have to be reviewed. It will be an extraordinary opportunity to urge with insistence that we stop killing in cold blood, which is the case of death penalty executions, as well as coldly leaving millions of people to die of hunger or curable illnesses, at the same time as calling for the suppression of the most serious forms of discrimination against women and the universalization of basic education.

38 RODRÍGUEZ ZAPATERO, J.L., Preface to *Contra el espanto and Por la abolición de la pena de muerte*, Tirant lo Blanch, Valencia, 2010.



Death penalty: A cruel and inhuman punishment is an academic contribution by Academics for abolition aimed at fostering the debate launched by the United Nations General Assembly in its resolution 62/149 on 18 December 2007, calling for a worldwide moratorium on executions by 2015, and continued by the upcoming review process of the UN's Millennium Development Goals (MDG). It is mainly a compilation of papers written by the speakers at the Seminar "Against cruel and inhuman punishment and death penalty", which took place at the Real Academia de Bellas Artes de San Fernando, in Madrid, on 9 June 2013, on the eve of the 5th World Congress against the death penalty. The book deals with current issues of the process towards abolition as the lack of evidence about the deterrence effect of death penalty and its consideration as a cruel and inhuman punishment. Together with the editors, the contribution includes studies, among others, of H.J. Albrecht, Gabrio Forti, Roger Hood, Salim Himnat and Sergio García Ramírez. The Academic International Network against the Death Penalty (REPECAP) dedicates this book to the International Commission against the Death Penalty (ICDP) chaired by Federico Mayor Zaragoza.



tirant lo blanch



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